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ADMINISTRATION OF JUSTICE IN MADRAS.

We have before us the report on the administration of Civil Justice for the year 1898. The order of Government on the reports in former years used to be a short abstract of the work done in the year under review, but in the present instance the Government have simply been pleased to record the administration of the report on Civil Justice. The change in the mode of dealing with the report is to us exceedingly welcome. Unless any questions of principle involving reform are raised in these Government Reviews, it serves no useful purpose to have a rehash of the figures contained in the High Court reports.

We do not propose to give an abstract of the work done by the various classes of courts in the Presidency, or to repeat our usual praise of the District Munsifs and our usual disapprobation of the higher ranks of the judicial service. There are, however, a few matters of interest which suggest themselves to us. In paragraph 5 of the report, the statement is made that the system of trial by Bench Courts under S. 9 of the Village Courts Act continued to be in force in the same districts as in the previous year. Looking at statement C; at page 42, we find the system of Bench Courts is not in force in some of the advanced districts of the Presidency, such as Tanjore, Trichinopoly and Malabar. We have no explanation as to why the system has not been extended to these districts, or more largely enforced in all the districts. We can imagine no other reason than the indifference of the Collectors of those districts to the question. The report does not proceed to deal with the advantages or the greater popularity of these Bench Courts in comparison with the Village Courts presided over by a single officer. If the figures are any test upon the matter, Village Courts as a whole, with 98,249 suits instituted in the year under review, seem to be increasing in popularity. We hope the

Government will call for the opinion of District officers generally as regards the best method of increasing the work and popularity of the Village Courts.

The report states that the disposals by District Munsifs in 1898 are the highest on record. We have more than once drawn attention in these pages to the fact of District Munsifs being over-worked. It appears that the average number of working days in the regular District Munsifs' Courts was 234 in the year. This is more than the average number of working days of the judicial officers of higher rank and accounted for by the difference in the period of the long vacation. It has more than once been suggested that the summer vacation of District Munsifs should be as long as that of Subordinate and District Judges, there being no reason why a class of judicial officers, whose mental strain is not less severe than that of officers of higher grades and who have shown themselves capable of turning out better and more satisfactory results than their better paid brethren, should not enjoy the period of mental and physical rest sufficient to renovate their energies. We hope the authorities will recognize the fact that even in matters of mental work there is such a thing as straining the mind beyond the limits of perfect recovery. Under the Civil Courts Act of Madras the power is vested in the High Court of fixing the period of the summer vacation up to a limit of two months. The Government has no voice in the matter, and the body that supervises the work of these judicial officers and has the best opportunity of acquainting itself with the nature and quality of the work turned out should have no hesitation in sanctioning the full period allowed by the law. We think the High Court should not merely record their satisfaction that during the year under review the District Munsifs disposed of 5,560 ordinary suits and 9,396 small causes more than in the year 1897.

We think the time has come when the Government ought to increase the jurisdiction of the City Civil Court to at least Rs. 5,000. There can be no doubt that the experiment has proved a signal success. The Court, moreover, has had the singular good fortune of being presided over by officers both able and popular. The Court has answered the best expectations of its well-wishers. We trust we shall not be considered disrespectful to the High Court,

if we venture the remark that cases now tried and disposed of by the City Court are better and more carefully tried than they would have been if their lot had been cast in the High Court; and we have no hesitation in saying that there is a considerable number of original suits still being tried on the Original Side of the High Court, in which there is a chance of better justice being rendered if they are transferred to the jurisdiction of the City Court.

Speaking of the Original Side, it occurs to us that a change ought to be made in the rule which practically dispenses with any record of evidence and leaves the party dissatisfied with the decree of the Judge of First Instance without the means of satisfying the Appellate Bench as to any error in the judgment of the First Court. That the Judges who happen to preside on the Original Side of the High Court are only too prone to err in their judgments is manifest from the large percentage of reversals notwithstanding the scantiness of the materials with which the appellant is supplied to attack the decisions of the Court of First Instance. It is said that the notes taken by the Judge of the evidence given at the trial are his property and that copies thereof should not be supplied to *either of* the contesting parties. This strange and somewhat novel doctrine which has come into vogue within the last three years of the High Court's history has been found to be productive of a not inconsiderable amount of injustice. It is often said that each party is at liberty to take his own notes and in not a few instances the spectacle is presented on appeal of the Bench in possession of one version of the appellant in possession of another and the respondent in possession of a third on points of material interest in the case. In cases of appeal, copies are supplied in England of the Judge's notes to each of the contesting parties. But if this doctrine of judicial property is to retain its hold upon the judicial mind, arrangements ought to be speedily made for evidence being taken by a sworn clerk in attendance. The matter was engaging the attention of the profession during the time of the late Chief Justice. But no definite step was taken as there was not much hope of reform in this direction during his Lordship's *regime*. We trust that an appeal will be early made to his Lordship the present Chief Justice, who while at the bar must have greatly felt the inconvenience of the present rule.

Paragraph 58 of the report deals with the financial results of the administration of justice. The total receipts and charges of Civil and Criminal Courts amounted in round figures to 64 and 49 lakhs respectively, leaving a surplus of 15 lakhs in favor of Government. We have repeatedly protested against the Government making a profit out of litigation. A Government on the verge of bankruptcy threatened with periodical famines and frontier expeditions is not likely to listen to a cry of excessive impost on litigation.

The convenient theory has been started that the people of India are notoriously litigious and the malady is sought to be kept under restraint by the heavy tax on Justice. We have never accepted the position that the people are prone to be litigious. We have often pointed out that the evil if any lay in the unmeaning refinements of adjective law which promote litigation. But, be this as it may, it is difficult to justify a tax which brings in more than the cost of both civil and criminal administration together and places a sum of 15 lakhs to the credit of Government. The receipts in Court-fee stamps on account of service of processes in Civil Courts, excluding discounts for sale of stamps at 1 per cent. on that amount, amounted in round figures to Rs. 12,80,000, and the Government have made a profit under this head of Rs. 6,80,000, *i.e.*, Rs. 69,000 more than in 1897. It appears to us that this extraordinarily large and increasing profit should not be pocketed by Government without a word of explanation.

The process fees ought to be reduced so as to make the receipts and expenditure balance each other. Again, the actual receipts in copy stamp papers in Civil Courts amounted to Rs. 2,36,000; excluding charges on account of their supply at 20 per cent. on that amount, the net receipts amount to Rs. 1,59,000. The surplus, therefore, under the Copyist fund amounted in round figures to Rs. 30,000. Now, what has become of these annual surpluses? Why should not the copying charge be reduced? We expect the report of the High Court, or the annual order of Government to say something on questions of this description. But we look in vain for information on these matters to these departmental productions. We trust some member of the Legislative Council will draw the attention of the Government to the points we have dealt with and elicit information from them.

There is a paragraph in the report about inspection of the Subordinate Courts by District Judges. We venture to ask the question how many of these officers are competent to make a satisfactory inspection of the Subordinate Courts. We do not know why the District Courts should not be inspected by some Judge of the High Court specially qualified for the task. We believe that many an irregularity will then be brought to light of which the High Court at present knows nothing. The whole report before us is in a stereotyped form without any light being thrown upon questions of interest that crop up every now and then in the system of administration.

THE HINDU LAW OF PRIMOGENITURE.

Brothers by mothers of different classes.

The *Saptur* case was recently disposed of by the Privy Council on the simple ground that there was a concurrent finding of the Courts in India as regards the custom of the son by the senior wife succeeding to an impartible estate in preference to an elder son by the junior wife. There was another question of considerable importance raised in the case, on which it became unnecessary to the Judicial Committee to pronounce any opinion. It was the subject of the third issue and the High Court of Madras decided (*vide Ramasami Kamaya Naik* v. *Sundara Lingasami Kamaya Naik*, I. L. R., 17 M., 422) that where a Sudra marries a woman of his caste, but of an inferior class as a dagger wife in addition to his wife equal in caste to him, the rule of selection in the matter of succession to an impartible estate is in favour of his son by the latter by reason of the mother being of a higher class.

We propose to examine the correctness of this decision.

The question was raised as a matter of pure law and not as one based upon any custom of the caste or tribe or locality. It virtually amounted to this, *viz.*, that though (1) the father of the plaintiff and the defendant, (2) Nagammal the mother of the plaintiff, and (3) Muthuverammal, the mother of the defendant, were of the same main caste, *viz.*, Sudras, and in fact of the same sub-section, *viz.*, Kambalas; and Nagammal was married to the deceased Zemindar (father of the parties) in accordance with the Kambala caste rites and ceremonies, yet by reason of the defendant's mother being a pure

Kambala, *i.e.*, Thottia Kambala, while Nagammal the plaintiff's mother was found to be a Kolla Kambala (said to denote a mixed caste) and also by reason of the former being born in a Zemindar's family while the latter was born only of an ordinary ryot, the defendant, the son by the former, had priority over the plaintiff, the son by the latter, on the supposed authority of verse 125, chapter IX, Manu. The facts found in connection with the class and rank of Muthuverammal and Nagammal were as follows; The former was the legitimate daughter of parents both of whom were Thottia Kambalas, the father being the younger brother of a Zemindar.

Nagammal, the latter, was the legitimate daughter of parents Muthuverasami Naick and Subbammal, neither of whom was Thottia Kambala, *i.e.*, a pure Kambala, because Muthuverasami was the illegitimate offspring of a pure Kambala, *i.e.*, Thottia Kambala (who was a Zemindar) by a woman of the Vellala caste, another sub-section of the Sudra caste, and Subbammal was the illegitimate daughter of Mulipatti Lingama Naick, a pure Kambala, *i.e.*, Thottia Kambala by one Kamakshi, a woman of the said Vellala caste. In other words, the grandfathers of Nagammal both on the paternal and the maternal side were pure Kambalas, but the grandmothers on both sides were of the *Vellala caste* and therefore the father and the mother of Nagammal were not pure or Thottia Kambalas, being the offspring of Thottia Kambala fathers by women who were not Kambalas but Vellalas. So far as the caste is concerned it is important to bear in mind that among Sudras illegitimacy does not affect caste, and that in fact it is no disqualification for inheritance either, or to succession by primogeniture to an impartible estate. The caste, therefore, of Nagammal's parents is not affected by their being the illegitimate offspring of pure Kambalas by women of the Vellala caste. Kambalas and Vellalas form two of the numerous sub-divisions of the Sudra class or caste. There was no evidence to show which of the two was superior or inferior to the other.

But undoubtedly marriage between a Kambala or a Thottia Kambala and a Vellala would be valid and the offspring legitimate. In other words, marriage between persons belonging to different sub-sections of the Sudra caste is valid and the offspring legitimate.

It need hardly be stated that under the Hindu Law and usage there are only four castes or classes, *viz.*, Brahmins, Kshatriyas,

Vaisyas and Sudras, and that in former times the marriage between a male of one caste with a female not only of his caste but of any of the lower castes was valid and the children of a man by a female of a caste lower than his own were called *Anulomajas*. Though a son by such union was regarded as perfectly legitimate, yet in competition with a son of the same father by a wife of the same caste as himself the share of the former was less than that of the latter.

Marriage of a male of one of the three lower classes with a woman of a caste higher than his was however not recognized. The offspring of such union were illegitimate and referred to as *Prathilomajas* and they had no rights of inheritance. The offspring of the mixed marriages in the *anuloma* form had distinct names assigned to them, such as *Murdhabhishikta, Ambashta, Nishada, Ugra, &c.*

The whole law on this subject, especially with reference to the caste of the offspring of the *anuloma* marriages, will be found discussed in *Brindavana* v. *Radhamani*, I. L. R., 12 M., 72. Marriages in the *anuloma* form are now obsolete and under the present law and usage marriage is valid only as between persons of one and the same main caste, *viz.*, Brahmins, Kshatriyas, Vaisyas and Sudras. Even under the former law, so far as Sudra males were concerned, they could validly marry only in the Sudra caste because they belonged to the lowest class and, as already pointed out, it was not permissible to one to marry a female of a higher caste; Such unions being prohibited and the offspring thereof designated *Prathilomajas* without any rights of inheritance. So far therefore as Sudras are concerned, to which caste the parties to the suit belong, even the ancient law in respect of *anuloma marriage* was altogether inapplicable and the difference in the allotment of shares to sons by wives of different castes was consequently inapplicable to a Sudra because all his wives could only be Sudras. Under the ancient law, in the case of the three regenerate classes, Brahmins, Kshatriyas and Vaisyas even in the case of partible property (and under Hindu law all properties are partible) right of primogeniture was recognized in the sense that among sons born of wives of the same caste an additional share has to be allotted to the eldest by the others. But in the case of sons of a Sudra no such right of primogeniture was recognized and

Manu declares as follows in verse 157, chapter IX, "For a Sudra is ordained a wife of his own caste only (and) no other, those born of her shall have equal shares, even if there be hundred sons."

In the case of *Brindavana* v. *Radhamani*, I. L. R., 12 M., 72, the question was whether the claimant in that case who was illegitimate was the son of a Sudra in which case alone he would have been entitled to succeed as heir. His illegitimacy being admitted the question was whether his father was a Sudra by caste. The paternal grandfather was admittedly a Kshatriya and the paternal grandmother was assumed to be a Sudra. In favour of the claimant it was contended that his father was a Sudra because the paternal grandmother was a Sudra and that he was qualified to inherit as the illegitimate son of a Sudra, though the illegitimate sons of the three regenerate classes are disqualified for inheritance. The decision in the case was however that the claimant's father was not a Sudra by caste and that he was an *Ugra,* an intermediate caste, being the offspring of a Kshatriya by a Sudra woman.

The parties to the *Saptur* case being Sudras and the plaintiff and the defendant being the legitimate sons of a Sudra by different wives the important question is whether in the absence of any custom or usage right of succession by primogeniture to an impartible estate is to be determined with reference to priority of birth or whether it is to be determined with reference to any difference in the social status or considerations as to the castes of the mothers of the plaintiff and the defendant, the mothers admittedly belonging to one and the same leading caste, *viz.,* Sudras, and in fact one and the same main sub-division of Sudras, *viz.,* Kambalas, assuming that they belong to different sub-sections of the main sub-division, the sub-sections being Thottia Kambala and Kolla Kambala or Parivara. The High Court admits that there is no precedent and it relies solely upon what it refers to as the implied authority of verse 125, chapter IX of Manu. This is certainly a decision which, if sound, would lead to most complicated results and lay the seeds for prolific litigation in Hindu society of all castes. Each one of the leading castes, *viz.,* Brahmins, Kshatriyas, Vaisyas and Sudras have in course of time given rise to numerous sub-divisions, and each sub-division in its turn has become split still further into numerous sub-sections. The Kshatriya class and the

Vaisya class are now very limited in numbers and the bulk of the population, excluding of course out-castes or Panchamas, may be divided into Brahmins and Sudras, the latter being by far numerically the stronger. Amongst Brahmins themselves the number of sub-divisions and sub-sections of sub-divisions is sufficiently large, but among Sudras the number of sub-divisions and sub-sections thereof is almost inconceivably large and the same is steadily increasing. From the standpoint of social and caste status, as a general rule, each sub-division considers itself superior to other sub-divisions, and the sub-section of each sub-division superior to the other sub-sections thereof and there is no work of authority to which one could appeal for determining the relative superiority or inferiority of these manifold sub-divisions and sub-sections. The law is now settled that marriage must be between persons belonging to one and the same leading caste, *viz.*, Brahmins, Kshatriyas, Vaisyas and Sudras, and that in the absence of any custom or usage to the contrary the marriage will be valid though the husband and wife belong to different sub-divisions of the same leading caste. The Hindu Law allows of polygamy and he may therefore validly marry two or more wives belonging to different sub-divisions of his caste. While recognising their legal status as wives and the legal status of their offspring as legitimate we are to import nice and controversial distinctions founded on considerations of social status and sub-sections of castes into the determination of their relative and preferential rights of inheritance to the estate of their husbands or fathers as the case may be on the authority of the decision now under appeal; the result will simply be confusion and disaster. No doubt the *Saptur* case relate only to the succession to an impartible estate and verse 125, chapter IX, Manu, on which the decision rests relates only to the right of primogeniture in the sense of giving an extra or larger share, but the principle of the decision will be equally applicable to partible estates also which have to be divided between sons by wives who belong to different sub-divisions of the same caste and on the authority of the analogy furnished by verses 149 to 153, chapter IX of Manu it will have to be divided in unequal shares with reference to the supposed superiority or inferiority of the sub-divisions of the caste to which the mothers of the respective sons belong. Strange to say, while by reason of the supposed superiority of the social status and caste of the defendant's mother

relatively to that of the plaintiff's mother, the impartible estate was decreed in favour of the defendant, the partible property left by the father was equally decreed between the plaintiff and the defendants. As observed by Mr. Justice *Holloway* at page 484 of I. Madras High Court Reports the classes spoken of and referred to by Manu in verse 125 and the verses immediately preceding and following the same are the four classes recognized by Manu, *viz.*, Brahmana, Kshatriya, Vaisya and Sudra and not the infinite sub-divisions of these classes introduced in the progress of time. Referring to the facts of that case he added "I think, therefore, that being a Sudra, the woman was of the same class in the sense of the authority quoted." No doubt on the analogy of the rules prescribed by Manu in the matter of partition and of primogeniture (in the sense already explained) which have now become practically obsolete by reason of marriages being now confined to persons belonging to one and the same leading class or caste, a custom or usage having the force of law might grow up in regard to sons by wives belonging to different sub-divisions of the same caste. But as already pointed out no such custom or usage was set up or relied upon. A custom or usage might grow up limited to succession to an impartible estate, entitling the son by a wife of pure Kambala or Thottia Kambala caste to succeed in preference to a son by a wife of an impure Kambala or Kolla Kambala caste though the latter may be senior in age to the former. The High Court as it seems to us erred in holding that apart from any custom or usage the existence of which was not even alleged, verse 125, chapter IX of Manu already referred to is an authority in favour of the defendant. It is impossible to stretch the said verse and other cognate verses so as to make them applicable to sub-divisions of castes or classes much less to sub-sections of the numerous sub-divisions. The analogies relied upon in the judgment of the High Court of an after-born son excluding an adopted son and of a legitimate son excluding an illegitimate son in the case of Sudras are really no analogies at all to the present case and it is difficult to conceive how they support the position taken by the High Court, that the son by a wife whose social and caste status is superior to that of another wife excludes the son by the latter wife though he is senior in age. The other analogy founded upon *anuloma marriage* is equally beside the point. For admittedly the anuloma marriage was a marriage between a male of one leading

caste or class and a female of a lower leading caste or class. The addition of the dagger in the marriage ceremonial which is found to be the same as that applicable to Kambala marriages cannot constitute the offspring of such a marriage a secondary son as observed by the High Court. If he is a secondary son it is difficult to see how he will be entitled to an equal share with the defendant, the primary son, in respect of partible property. The Judges of the High Court observe that it is difficult to account for the use of the dagger in the marriage ceremonial of Nagammal except on the hypothesis that she was of an inferior rank or class and that the only reasonable explanation is that she was taken and treated as a secondary wife not having the rank of *patni* within the meaning of the text of Manu.

It is impossible to understand what is meant by a secondary wife. No doubt as between wives who belong to different castes precedence will be given to the wife who is of the same caste as the husband. The caste referred to by Manu in connection with such precedence is one of the four leading castes. It is indeed difficult to follow or reconcile the reasoning of the High Court on this question. The High Court observe that although the plaintiff's mother and the defendant's mother were of the Sudra caste they have no difficulty in deciding that the status and rank of the plaintiff's mother was inferior to that of the defendant's mother. They also add that the defendant's mother was the daughter of a Zemindar while the plaintiff's mother was the daughter of an ordinary ryot.

The defendant's mother had no stain of mixed blood while the plaintiff's mother was of the Parivara caste being the descendant of parents of illegitimate origin. The High Court further say "considerably less money was spent upon Nagammal's marriage than in the case of the admitted wives and it was combined with the marriages of two other people of inferior rank of persons who were poor dependants of the Zemindar." "The plaintiff's mother and the other dagger wives as a rule lodged separately and messed separately from other wives." "It is therefore clear to us that the plaintiff's mother was in status and rank inferior to her husband and to the defendant's mother." "The question then arises whether having found the plaintiff's mother and the defendant's mother to be of the same main caste, namely, Sudras, though not of the same

division the difference in their rank or status should make them of a different class within the meaning of sloka 125, chapter IX of Manu. That sloka is to this effect. "As between sons born of wives equal in their class and without any other distinction there can be no seniority in right of the mother. But the seniority ordained by law is according to the birth." "The learned Vakil for the plaintiff maintains that Manu alluded only to caste, as he was there dealing with caste and that any other construction would be meaningless. But the ancient author seems to have been dealing with the equality of wives generally and it is quite possible as in this case that two ladies may be of the same main caste and yet belong to different sub-divisions of that caste and therefore be unequal in class or rank. The strict literal translation of the phrase rendered as 'wives equal in their class' is 'like wives'; which would allow of the wider interpretation that if there were any substantial inequality in the rank or status of the wives they would not be 'like wives.' Within each of the four main divisions of Hindu caste it is notorious, there are many classes or ranks and they are perhaps most numerous in the Sudra caste, and it appears to us that their Lordships of the Privy Council in making use of the words 'caste and class' in their Judgment in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar,* 14 Moore's Indian Appeals, pages 592 and 594 (Urkad Zemindari case) contemplated inequalities besides those in the main caste only, for otherwise the word 'class' would be superfluous if it was taken to be synonymous with the main caste."

If the position taken by the High Court were at all tenable, one would expect that some one or two convincing reasons would be advanced in favour of it and that the learned Judges would not be driven to the necessity of having recourse to arguments not one of which carries any weight. The very statement of the reasons relied upon shows how dangerous and disastrous would be the consequences that would result from upholding the proposition maintained by the High Court.

They observe that the literal translation of the phrase rendered as "wives equal in their class" is "like wives" which would allow of the wider interpretation that if there were any substantial inequality in the rank or status of the wives they would not be 'like

wives.' One certainly is curious to know what is the rank or status of he wives, the inequality in respect of which would determine the relative rights of sons by such wives. Again referring to verse 125 it was said that the word used was not caste *(jati)* but the expression was "*Sadrisa Strishu*" or wives of the same class, and then "*Aviseshathaha*" without any other distinction and that in verse 122 no allusion to caste or class was made, and referring to verse 125 that what it indicated was probably the inferiority of the class of the wife more than that of the caste and that this justified the use of the expression "caste and rank" in the judgment of the Judicial Committee of the Privy Council in the Urkad case. The endeavour on the part of the High Court to maintain that verse 125 does not necessarily refer to caste but that it refers to status and rank in a much wider sense than mere caste is due to their consciousness that the caste and class which Manu is referring to in Chapter IX is one of the four leading castes or classes and not the infinite subdivisions thereof. The translation of the verse 125 as made by George Bühler, which will be found at page 351 of volume 25 of the Sacred books of the East, is substantially correct and accurate. The literal translation will be the one as therein given omitting the words in the brackets. The words in brackets are inserted by the translator in order to bring out the real meaning of the verse and he has evidently taken the liberty of inserting such words on the authority of commentators. If the said verse does not refer to inequality of caste but to inequality in any respect such as social position, rank, riches, moral qualities, &c., it is too vague to be enforced by Courts in that case like similar verses in Manu and other texts cannot be judicially enforced. Is it not absurd to say that because the defendant's mother is the daughter of a Zemindar while the plaintiff's mother is the daughter of an ordinary ryot, therefore the defendant has priority of inhertance over the plaintiff? Suppose one wife is of a very amiable and good qualities and the other is not, or one is very handsome while the other is the reverse of it, therefore, they are not "like wives" and there is distinction between them; is the son by the amiable or handsome wife therefore to succeed to an impartible estate in preference to the son by the other wife who is not amiable or handsome? Bühler in his translation inserts the words "in caste" after "between sons born of wives equal." Having reference to what precedes and follows and the chapter in

which the verse occurs there can be little doubt that he is right in inserting those words for the purpose of bringing out the real meaning. Bühler evidently inserted the said words "in caste" on the authority of three of the commentators on Manu, *viz.*, Kulluka, Medhathithi and Nandana, all of whom say that the expression "*Sadrisa Strishu*" (like wives) means wives of the same caste. *Vide* Mandlik's Edition of Manu in Sanskrit with the annotations by the various commentators, pages 1178 and 1179. The other expression in the verse "Aviseshatah" "without distinction" according to Kulluka the said commentator means without distinction of caste being explanatory of "*Sadrisa Stri*" "like wives."

The insertion by Bühler of the word "and" before "without" and the words "any other" between the word "without" and "distinction" (*Aviseshatah*) is only the consequence of or explanatory of the wives being equal (in caste). The whole thing is accurately brought out in Bühler's translation of Manu (Trübner's Oriental Series, page 267). It runs as follows:—"If sons are born by mothers of equal (caste) and consequently without any distinction (of caste) the seniority is not according to their mothers (but) the seniority is declared (to be) according to (the time of) birth." This is the best and the most accurate translation of verse 125 and there can be no doubt whatever that it refers to the law as it obtained in the days of Manu when Anuloma marriages or the marriage of a male with a female of a caste inferior to him were recognized and permitted. It only means that the right of primogeniture in favour of the first-born was applicable only to the first-born among sons by wives of the same caste. From this it may not be unreasonable to imply that the first-born cannot claim the right of primogeniture as against an after-born son when his mother is of a caste inferior to that of the mother of the after-born son. If the caste referred to by Manu is as stated by Mr. Justice Holloway in *Panhiya Telaver* v. *Puli Telaver*, I. Madras H. C. R., page 484, one of the four leading castes and not the infinite subdivisions thereof, it is obvious that the Subordinate Judge and the High Court were grievously wrong in applying it to the present case and indeed the said verse is now practically obsolete by reason that no valid marriage can now be contracted between persons both of whom do not belong to one and the same leading caste. The High Court has entirely overlooked an important

rule in the administration of Hindu Law which has been laid down as follows by their Lordships of the Judicial Committee of the Privy Council in 12 Moore's Indian Appeals, page 436. "The duty of an European judge who is under the obligation to administer Hindu Law is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage." This has been reiterated by the same tribunal more than once in subsequent cases. Manu no doubt is a very high authority as lawgiver, but he is so only in the sense that he was the highest and earliest lawgiver as the law stood in his days : but a great deal of that law is now obsolete and different schools of Hindu Law have since sprung up. One has only to read the various chapters of his work to be convinced that no small portion of it is not living law now and notoriously the portion of the law which he deals with in Chapter IX in regard to marriages between different castes and the relative rights of the offspring of such marriages have now become obsolete.

The Mitakshara, Smriti Chandrika, Madhaviya, Viramitrodaya and Sarasvati Vilasa are generally referred to as works of high authority on Hindu Law in Southern India and the best proof that the position taken by the High Court is altogether untenable and speculative is afforded by the absence of any authority directly or indirectly supporting the theory which they deduce impliedly as they say from verse 125 of chapter IX of Manu. They are not able to rely upon any one of the numerous commentators or upon any precedent, judicial or otherwise. Under these circumstances they seek to derive some consolation and support from the reservation which the Judicial Committee of the Privy Council made both in the Urkad case and the Bangaripoliem case as to what the operation of the law and custom of primogeniture would be if there was inequality between the mothers of the rival claimants in respect of their class and rank.

In both these cases the rights of the first-born was upheld in preference to a son subsquently born of a wife married earlier. In neither case did a question arise as to the mothers being unequal in caste, class or rank.

In the former case their Lordships stated as follows at page 592, "But it was contended that where there were sons by different wives the priority of marriage and not of birth was to be regarded. No authority whatever was cited to support this contention, certainly none as regards the sons by any wives after the first. On the contrary there is a good deal of authority pointing to the conclusion that there is no distinction except seniority of birth amongst the sons of wives of the same caste and class." In the latter case their Lordships observed as follows at page 292, "It is not contended that in the present case the wives are not of the same class and their Lordships do not determine what would be the proper rule of succession where the wives are of a different class or caste. The question does not arise." It is not, therefore, right to refer to these two decisions of the Privy Council as lending any the least support to or countenancing the position sought to be maintained by the Subordinate Judge and the High Court on appeal.

The Judicial Committee of the Privy Council as a general rule, especially in regard to questions of Hindu Law turning upon obscure texts, refrain from deciding questions which are not necessary for the decision of the case but content themselves with deciding the question which actually arises. In the Urkad case verses 122 to 125 among others had to be considered and their obscurity commented upon. Attention may also be drawn to a learned note in Bühler's translation of Manu in the footnote to verse 125, chapter IX of Manu from which it will be seen how hopeless it is to reconcile the various verses beginning with 123 and ending with 126 and how discordant the views of the commentators are. The only question is whether the inequality among wives referred to in verse 125 is not simply an equality of caste and not of social status or rank and if so whether the caste of the wives which should be the same is not one of the four leading castes or classes and not the infinite subdivisions thereof. It is hoped that it has been conclusively shown that the verse refers only to distinction of caste and that the caste therein referred to is one of the four leading castes and not the infinite sub-divisions thereof; and that in the absence of any custom or usage which has sprung up in regard to sub-divisions of one and the same caste in analogy to the rule of law in regard to the four leading castes, the High Court ought to have found that the

plaintiff by reason of his being the senior in age was entitled to succeed by primogeniture in preference to the defendant.

That verse 125 is or was not at all applicable to the fourth or the Sudra class or caste is conclusively established by verse 157 already quoted which lays down that for a Sudra is ordained a wife of his own caste only, and no other, and that those born of her shall have equal shares even if there be a hundred sons and that there is therefore no right of primogeniture.

JURISPRUDENCE.

VISVARUPA'S COMMENTARY ON YAJNAVALKYA.

Inheritance.

1. Of the property thus acquired in the various modes previously described :

"If the father makes a partition, he may separate his sons at his pleasure; he may either dismiss the eldest with the best share or all may be equal sharers." [1]

When, wishing to enter another order, or intending to make his good sons practise virtue or from pleasure, the father unites his sons with his wealth, then he may give his sons whatever he is pleased to. The meaning is that the father shall not be compelled to make a partition or to make it in a certain manner by his sons at their pleasure. Therefore also he may unite his eldest son with the best share, if he thinks fit; or else he may allot greater and less shares or make them all equal sharers. There it shall be as the father wishes. Thus the rule about the division of the sons is unimpeachable and is independent of affection, good qualities, etc., as in the case of a partition made by an umpire.

2. **"If he makes the shares equal, the wives to whom no stridhana had been given by their husband or father-in-law should also be made equal sharers."** [2]

If equal shares are allotted (by the father), the widows of his sons and grandsons, and his own wives to whom no stridhana had been given by their husband or father-in-law or himself, should be made partakers of their husbands' shares; or those to whom stridhana had not been given should be given portions equal to

[1] Yajnavalkya, II., 114. [2] *Ibid*, II., 115.

their stridhana. Even if the property be very large, only so much (as 2,000 panas) should be given them, as is laid down in the next "Two thousand panas is the share of a woman"; even if the property be very little, they should be given an equal share. Others hold that an equal share is ordained, because of these being eligible for niyoga (appointment to raise up issue); but that is unsound, as niyoga is impossible. But where niyoga is possible, they can only get the portion necessary for it.

3. Of one who does not care to take the father's property and is able to maintain his family and practise virtue, (Yajnavalkya says):

"The separation of one who is competent and unwilling to participate, should be effected by giving him some trifle. Of those separated with greater and less shares, the partition made by the father is pronounced legal." [1]

Something, a mere present, should, to avoid future disputes, be given even to a person who is not desirous of participation, and separation made. If it be asked "Would there not arise disputes if he afterwards says 'I did not take my entire share; so let it be given'", we say there cannot. Why not? because it is laid down (in the latter portion of the text): "For those separated with greater and less shares the partition made by the father is pronounced legal." "Those"; after this, the word 'sons' is understood; the meaning is that that partition alone which is effected by the father among the sons is declared to be lawful.

4. **"After both parents, the sons shall of themselves divide the effects and the debts equally; the daughters shall take what remains of the mother's property after discharging her debts; in their default, the issue."** [2]

The sons shall, after clearing up the debts, take the remaining wealth. The use of the term 'suta' is to indicate the pre-eminence of aurasa sons. Parents] mother and father. After both parents] after their death. They shall divide the paternal wealth after the father's death, and the maternal after the mother's. Even if there exist no wealth, they shall share the debts equally; from equality being stated in the matter of paying up debts, it is inferred that partition also shall be equal. As for the unequal partition laid

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[1] Yajnavalkya, II., 116. [2] *Ibid*, II., 117.

down in another Smriti: "The deduction for the eldest is a twentieth (of the whole property) together with the best of all chattels," that should be understood to apply only if the brothers mutually assent to it. Others, thinking that the object of partition is the performance of religious rites, state that the unequal partition laid down in the texts has reference to (the possession or absence of) good qualities. But that should be understood to be unsound, as wealth is one of the (four) objects of human endeavour. As for those texts, however, which lay down the resumption of wealth in case of non-performance of agnihotra, etc., they are intended only as a check to one who commits forbidden acts, and not to establish that the object of wealth is the performance of sacrifices, etc. Therefore unequal partition can be made only if the brothers are so disposed. As for the text of Gautama which propounds the disinherison of persons addicted to vice, even that should be construed as merely admonitory, as the author himself lays it down once as the opinion of some others. This is the gist in brief. Just as the sons are equal sharers in the wealth of the father, so also are the daughters in the property of the mother remaining after her debts have been discharged; but they need not (unlike sons) pay up the debts of their mother, if she leaves no property. Then (is it said) there seems to be no connection between the sons and the mother; no; there is; for in default of daughters, *the issue, i.e.*, the sons (take the mother's wealth). Others, however, take it to mean that in the absence of daughters, their issue (*i.e.*, of the daughters) alone take; but that is unsound from the Vedic hymn: "Na jámayétán vo rikthamāraik." If it is said that it refers to the paternal wealth, we say no; because of the text which lays down the relation of the mother: "Yadi mátaro, etc.," that is, if mothers beget daughters and sons. Vanhi] worthy of being borne, *i.e.*, son. The meaning here is that the son alone is the heir and not the daughter. From this very text regarding one worthy of being borne, it becomes settled that the impotent, etc., who are unworthy of being borne are portionless. Then you may say 'let the property go to the sons alone'; we say that may not be; on account of the text: "The daughters, of the mother." Therefore daughters succeed agreeably to other Smritis and Srutis. Therefore it is established that in default of the daughters, the property certainly goes to the sons.

5. Of persons dwelling together, (Yajnavalkya says):

"Wealth acquired by oneself without detriment to the paternal estate, as also presents from friends and property received during marriage; these do not belong to the coheirs." [1]

Whatever was acquired by one (of the coheirs) without injury to the paternal estate, and likewise what was received from friends or at the time of marriage, belong to the acquirer alone and not to the other coheirs also. Maitram] what was received from a friend. Oudváhikam] what was received during marriage. Wealth received from friends, etc., is certainly indivisible, even though acquired to the detriment of the paternal wealth; for it was acquired by the exertions of the acquirer alone. Others, however, are of opinion that only such wealth received from friends, etc., as is obtained without injury to the paternal property is indivisible, on the reasoning regarding the application of general and special laws; that, however, is unsound, as marriage may be accomplished by the use of the common wealth.

6. But, as regards other (sources of increase) than what is received from friends, etc., Yajnavalkya says:

"But if one improves his property by the use of common stock, an equal division is ordained. Among sons of different fathers, the allotment of shares is according to the fathers." [2]

The property which is acquired by the use of the common stock is here meant. The meaning is of the property so improved, there is certainly a partition. The particle 'tu' is for the sake of emphasis. Therefore the meaning is that partition must certainly take place. That partition is declared to be equal among all coheirs even though the property was acquired by the physical exertion, etc., of one alone of them. Do all the coparceners share equally? No; the brothers alone. Among sons of different fathers, *i.e.*, of brothers' sons, the allotment of shares is according to the allotments of their (several) fathers. The meaning is that after the brothers divide the property in equal shares amongst themselves, the sons of one of the brothers (who is dead) shall divide the share (of their father) equally amongst themselves. The drift is that the grandsons have a claim on the grandfather's property only through their father; and not by themselves, like their father.

(1) Yajnavalkya, II., 118. (2) *Ibid*, II., 120.

7. Then (it is asked) does ownership accrue from partition, or is partition the result of ownership; it is replied that ownership accrues from partition. Otherwise the text, which enjoins a person having a son to perform sacrifice (ádhána), would be contradicted, because the property is common and it is not possible to give it away. Nor could there be the text of Smritis which enjoins partition at his option; nor is it reasonable to say that the sacrifice should be performed with the son's permission; for one cannot give his consent as soon as he is born. To remove these doubts, Yájnavalkya says:

"Land acquired by the grandfather, corrody and chattels; in these the ownership of both father and son is equal." [1]

It is to be understood that the ownership of both father and son in land acquired by the grandfather, in a corrody, *i.e.*, imperishable wealth, and other property, is equal. The meaning is there is no doubt about it. The use of the term 'both' is to suggest the ownership of the unseparated alone. The separate mention of land, etc., should be understood to be due to their being indivisible or immoveable. As for the objection to the impossibility of performing sacrifices, etc., they can be performed with self-acquired wealth, or by instituting a partition of a portion then and there. As for the text of Smriti which lays down partition at his pleasure alone, that is applicable to the owner of self-acquired property. Therefore it is settled that right to partition arises only from possession of ownership.

8. Because partition results from ownership, therefore:

"A son born, after partition, of a woman of equal caste takes a share; or his share shall be made out of the visible estate corrected for income and expenditure." [2]

If subsequently to a partition made by the brothers while the mother's menstruation had not ceased, a son is born, then he also certainly has a right to the property. Therefore it has been said that only where there previously exists ownership, there is partition. If, however, right to property were to accrue from partition, then no share will go to the after-born son. But it is here stated that he also has a right to the property. Therefore partition is the result of ownership. To make that clear is the following text begun: "The son born, though after partition, of a woman of equal caste,

[1] Yájnavalkya, II., 122.

[2] Yájnavalkya, II., 121.

takes a share." The verb 'syát' should be supplied. Though the share is not specified, it should be understood that he takes the father's share; for Gautama says: "The son born after partition (takes) the paternal wealth." If the father has no property, then the share of the after-born son shall be made out of the visible property of the brothers. This, however, is the distinction: (he shall take a share of such wealth) after it is corrected for income and expenditure. Income] what was acquired by oneself. Expenditure] what was expended out of that wealth. The meaning is that the wealth so corrected for income and expenditure shall be divided (by the brothers) equally with the after-born son.

9. The author explains this:

"If one recovers property duly descended but which was subsequently taken away, he need not give it to the (rest of the) coheirs: as also wealth acquired by learning." [1]

He, who being separated, by his own ability makes his own, with the consent of the other coheirs, property regularly descended from father to son but which was not enjoyed by them at the time of partition, need not give it, at a second partition, to the after-born son and the other coheirs; likewise what was acquired by learning. By the particle 'etc.' are denoted presents from friends, etc., which are included in 'corrected for income and expenditure.'

10. Further:

"Whatever is given by the parents belongs to him alone on whom it was bestowed." [2]

This rule applies to the share of the after-born son in the property of the coheirs who are alive.

11. "Of heirs dividing after the death of the father, the mother also takes an equal share." [3]

The mother who has no stridhana shall also take a share equal to that of the son. The term 'mother' here should be understood to refer to any wife of the father, all his wives being equally related to him.

12. Moreover:

"Uninitiated brothers should be initiated by brothers already initiated; and sisters (married) by giving them a fourth part." [4]

Initiation] marriage. That should be performed for uninitiated brothers by brothers already initiated. Property remaining after

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1. Yájnavalkya, II., 119. [2] *Ibid*, II., 123. [3] *Ibid*, II., 123. [4] *Ibid*, II., 124.

expenditure incurred on this account should be divided. It is understood from this very text that the marriage should be performed out of the common wealth, and that the wealth acquired at the marriage minus the expenditure belong only to the acquirer. Hence, the brothers should be initiated out of the common property alone; and sisters also (married). If, however, there is no property at all, then the coheirs should each contribute a fourth of his own property for the sister, and the residue shall be divided equally.

13. Thus (has been declared) the equal participation of (brothers) equal in caste. Now, of brothers of different castes:

"The sons of a Brahmin, in the several castes, have four shares, three, two and one respectively; the sons of a Kshatriya, three, two and one; and the sons of a Vaisya, two and one." [1]

If a Bráhmin has sons born of wives of each of the four castes, Bráhmini, etc., then the property should be divided into ten, six and three shares; and four, three, two and one shares should be allotted to the sons. Four shares belong to the son by a Bráhmini wife; three to the son by a Kshatriya wife; two to the son by a Vaisya, and one to the son by a Súdra. Similarly it should be concluded that among the sons of a Kshatriya, three shares belong to the son born of a Kshatriya wife, two to the son by a Vaisya and one to the son by a Súdra. If it be urged, that there cannot be sons of a Bráhmin by Súdra wives, as such marriage is prohibited, we say true; the purport is that this rule of partition applies to the case of one who contracts such marriage, in ignorance of the meaning of the Smritis.

14. If the coheirs have unequal allotments, then:

"Effects which have been withheld from one coheir by another, and which are discovered after partition, they shall divide again in equal shares. This is a settled rule." [2]

The use of the expression 'settled rule' is to assert that there shall certainly be an equal partition.

15. This rule of partition is with reference to aurasa sons. In default of aurasa sons,

"The son begotten by a sonless man on another's wife, under legal appointment, is the heir and giver of the pinda to both." [3]

If it be urged that this rule does not apply to the Bráhmins, as niyoga is prohibited among them, but applies to the Kshatriyas

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[1] Yájnavalkya, II., 125, [2] *Ibid*, II., 126. [3] *Ibid*, II., 127.

and others, (we say) no; there is no prohibition of niyoga in the case of Bráhmins but only in the case of Bráhminis; therefore the son begotten by another cannot belong to the Bráhmin. But a Bráhmin may well beget a son on women of Kshatriya caste, etc.; therefore the rule is unobjectionable where there is no aurasa son.

16. Of what description is the aurasa son? It is stated:

"The aurasa is the son procreated on the lawful wedded wife. Equal to him is the son of the appointed daughter. The kshetraja is one begotten on the wife by a sagotra or by some other." [1]

Lawful wedded wife] a wife of equal caste espoused according to the Bráhma and other forms of marriage. The aurasa is the son begotten by himself on her. The expression 'equal to him' is to suggest the superiority (of the son of the appointed daughter) to the kshetraja and the rest. The nature of the appointed daughter should be learnt from other Smritis. The kshetraja is a son procreated on one's wife by his sagotra or any other by legal appointment.

17. Even if appointment be not made

"The gudhotpanna is a son secretly produced in the house. The kanina is a son born of an unmarried woman.[1] He is considered as the son of his maternal grandsire." [2]

These two sons should be known to belong to their mother's caste, since their father is not known.

18. So also:

"A paunarbhava is the son begotten on a woman whose first marriage had not been consummated or on one who had been deflowered (before marriage). He whom his father or mother gives for adoption shall be considered to be the dattaka." [3]

A paunarbhava is one begotten on a woman whose husband had died and whose first marriage had not been consummated, or on a deflowered woman, who, having been living with others re-enters her husband's family. A dattaka is one given away by his parents, *i.e.*, father or mother with his permission. So also Vasishtha says: "Let not a woman give or take a son without her husband's consent." Thus a dattaka is one who is given away by his father and mother according to law.

S. SITARAMA SASTRI.

(To be continued)

[1] Yajnavalkya, II., 128. [2] *Ibid*, II., 129. [3] *Ibid*, II., 130.

NOTES OF INDIAN CASES.

Bakar Sajjad v. Udit Narain Singh, I. L. R., 21 A., 361. We are obliged to the learned Judges of the Allahabad Court for a full exposition of the Privy Council Case of *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan*, I. L. R., 26 C., 39. We were unable to see from the report of that case that the Privy Council dealt with any question beyond the date fixed for realization in the decree. The whole record of that case was sent for by the Allahabad Court and it appears now clear that while the High Court awarded the contract rate of interest from the date of plaint up to the date fixed for realization, namely, six months from the date of the decree, the High Court awarded 4 per-cent. after the later date up to the date of actual realization. It is true, no question arose before the Privy Council as regards the award of interest beyond the date fixed for realization; but there is no doubt that their Lordships approved of the award made by the High Court when they said that the sections of the Transfer of Property Act seem clearly enough to direct accounts allowing the rate of interest provided by the mortgage up to the date of realization, not, be it noted, up to the date fixed for realization. The meaning of the Privy Council is further clear when referring to the award of the lower rate of interest after the date fixed for realization, they said "if the High Court has allowed something less the mortgagee makes no complaint. The mortgagor cannot complain if he is made to pay no more than he contracted to pay." It follows from the above quotation that in mortgage decrees the Court should provide future interest at the rate stipulated up to the actual date of realization; and not merely up to the date fixed for it in the decree. This exposition of the Privy Council decision with the help of the printed record does away with the conflict that previously existed between the several High Courts.

Robert Fischer v The Secretary of State for India in Council, I. L. R., 22 M., 270. It is important to note what the Privy Council has pointed in this case that S. 42 of the Specific Relief Act does not exhaust all suits for declaration. It is not necessary that the plaintiff seeking for a declaration that the order of Government directing a cancellation of separate registry is void should ask for any separate consequential relief. If the declaration by the Court is not obeyed by the Collector, the party would be at liberty to apply to the Court for further direction. The observation of the Privy Council that the arm of the Court is long enough to reach the offender is liable to the misconstruction that

every declaratory decree is capable of enforcement by execution. We do not suppose that the Privy Council intended any such meaning. The order of Government had the effect of cancelling the registry and when that order is declared void, it means that the cancellation is set aside. The declaration and the so-called consequential relief of restoring the original separate registry are in the view of the Privy Council practically the same.

Tirumal Rao *v.* **Syed Destaghiri Miyah,** I. L. R., 22 M., 286. A question of importance is raised in this case whether S. 310-A is applicable to sales under mortgage decrees. If S. 310-A is held not to be applicable, upon the same reasoning all the provisions in the chapter relating to sales in execution must also be held to be inapplicable; and we can see no warrant for this conclusion. The language of the sections beginning with S. 286 is sufficiently wide to cover sales under mortgage decrees. If S. 310-A were not applicable, Ss. 311 and 312 cannot also be applicable and this result would never have been intended. In *Kedar Nath Rant* v. *Kali Churn Ram,* I. L. R., 25 C., 703, the Calcutta High Court relies upon S. 104 of the Transfer of Property Act, so that unless there are rules made by the High Court making S. 310-A applicable no question can arise of its applicability. We do not suppose that the power conferred by S. 104 necessarily implies that the provisions of the Code with regard to sales are inapplicable. The power may well be exercised in the framing of rules supplemental to the provisions of the Code. Assuming that where rules are made under S. 104 excluding the operation of S. 310-A, that section is inapplicable, there is no reason why it should not apply where no such rules have been made.

Sinaya Pillai *v.* **Munisami Ayyan,** I. L. R., 22 M., 289. We doubt whether the conclusion arrived at by the Court follows from the reasoning that a mortgage without the sanction of the Court made by a guardian appointed under the Guardian and Wards Act is voidable by the minor. In a suit upon the mortgage, the minor's guardian objects to the validity on the ground of want of sanction. It may well be when the minor's estate has benefited by the mortgage money, the mortgage cannot be avoided without the return of the benefit. The mortgagee would, therefore, be entitled to recover the money from the minor's estate. But that is very different from enforcing the mortgage. The decree of the Subordinate Judge in this case enforced the mortgage according to its terms with reference to interest, etc. All that the plaintiff would be entitled to would be the return of the money without the interest stipulated from the minor's property generally and not as mortgage

money by sale of any specific property. The High Court appears to us to be wrong in affirming his decree.

Gowdu Magata *v.* **Gowdu Bhagawan,** I. L. R., 22 M., 299. We do not think there is any analogy between the provisions of S. 523 and those of S. 525 of the Code. The application is in both cases registered as a suit and the refusal to file the agreement is a formal expression of an adjudication upon a right claimed and is, therefore, a decree. As regards S. 525 there may be a decree in the same way, but S. 526 read with S. 522 prohibits an appeal from the decree.

Rama Sastri *v.* **Narasimha Ayyan,** I. L. R., 22 M., 30. We have no doubt that the assignment of a mortgage, namely, a right to recover the money is a transfer of an actionable claim. The judgment makes no reference to the authorities, but we think the reasoning of the Allahabad High Court in the Full Bench case, is conclusive on the matter. *Fateh Chand* v. *Muhammad Baksh*, I. L. R., 16 A., 259. See however *Mahomed Yusuf* v. *Abdur Rahim Bepari.*, I. L. R., 26 C., 839, *Muchiram Barik* v. *Ishan Chunder Chuckerbutti*, I. L. R., 21 C., 569 and *Russick Lall Ral* v. *Romanath Sen*, 792.

Dharmapuram Pandara Sannadhi *v.* **Vira Pandiyam Pillai,** I. L. R., 22 M., 302. It is much to be regretted that thiscase had to be decided upon the texts of the Hindu Law. We do not question the correctness of the opinion that according to the texts a Sudra cannot enter the order of *sanyasin;* but we must wilfully shut our eyes to the facts if we do not recognize that Sudras do enter the order and are treated as *sanyasins* everywhere. It is competent to anybody to renounce, the world, be he a Brahmin or a Sudra, and that is all that a *sanyasam* implies. If a plea of custom had been raised the Court would have been bound to come to the conclusion that there are Sudra ascetics all over the country and that the rule of succession is similar to the rule of succession laid down for the orthodox *sanyasins* as recognized by the texts.

Rangammal *v.* **Echammal,** I. L. R., 22 M., 305. We are glad that the High Court has seen its way to hold that a son's widow where a husband had left no property is entitled to maintenance out of the self-acquired property of the father-in-law in the hands of his heirs. We have no doubt that this was the true Hindu Law; and it is a source of satisfaction that the right rule has been laid down by the Court. Whatever anomalies there may be in the Hindu Law a right understanding of its principles upon a liberal interpretation of the Law makes in favor of modern ideas of justice.

SUMMARY OF RECENT CASES.

Mahomedally Moola Tyabji *v.* John Campbell.

Where a tenant, under a monthly tenancy, is obliged to vacate the premises under an order from a Plague Authority appointed under the rules framed under the Epidemic Diseases Act (III. of 1897) he is not thereby absolved from the liability to pay the rent for the remaining portion of the month and to give the usual month's notice to quit.—1, *Bom. Law Reporter*, *p.* 739.

Hindu Law—Adoption—Datta Homa—Regenerate classes—Adoption of a brother's son.

Valubai *kom* Kashinath Abaji Joshi *v.* Govind Kashinath Joshi.

In the Bombay Presidency the *Datta Homa* ceremony is not essential to the validity of the adoption of a brother's son, even though the parties be members of one of the three regenerate classes.—1, *Bom. L. R.*, *p.* 739.

Laxman Darku *v.* Narayen Laxman Khatik.

A minor sued for partition and obtained a decree which ordered that he should receive a certain amount of income every year during his minority and that when he became a major he should recover his share of the land. The minor then died and his widow presented a *darkhast* to execute the decree.

Held, (1) that the effect of the decree was clearly to make the minor a divided member of the family;

(2) that the heirs of the minor could, in the execution proceedings, recover the arrears of the allowance up to the death of the minor;

(3) that his heirs could not claim in the execution proceedings either the share or the subsequent allowance as awarded in the decree, which would be recoverable only by a separate suit.—1, *Bom. L. R.*, *p.* 777.

Hindu Law—Purchaser of a property from one co-parcener—Suit by the purchaser—Partial partition not allowable.

Shivmurtepp *bin* Bashetappa Katti *v.* Virappa *bin* Shivlingappa Kavdi.

The plaintiffs having bought at a Court sale the share of defendant 1 in a warehouse, which was held by him jointly with his brother

defendant 2, brought a suit to obtain half a share of it partitioned off and given to them. Defendant 2 claimed that there should be a general partition made of all the joint property and that his share in it should be ascertained and given to him. The Lower Courts held that there was no necessity for a general partition as it was clear that a half-share of the warehouse in suit would fall to defendant 1 if a general partition were made:—

Held, (1) that the decision of the Lower Courts could be upheld only where none of the co-parceners, but the purchaser only wished a partition; and the decision would not hold good where a general partition is desired and asked for by a co-parcener.

(2) that where the members of a joint family themselves desired a general partition that prayer could not be refused.

Per Parsons, J.—It is the right of every defendant in a partition suit to ask to have his own share divided off and given to him and the fact that the partition suit has been brought by a purchaser cannot alter or annul that right.

A defendant claiming a share on partition is, *qua* that claim, in the position of a plaintiff and could be called on to pay Court-fees on the value of his claim.

Per Ranade, J.—A suit will not lie for the division of any single property, and the only remedy is by general partition. The exceptions recognized to this rule are—

(1) where any portion of the joint property is not in the possession of any of the co-parceners by reason of its being in mortgage with third parties, in which case such mortgaged property, if not available for immediate partition, may be excluded from the partition suit; and

(2) where any property is within the jurisdiction of a foreign court.—1, *Bom. L. R.*, *p.* 620.

Civil Procedure Code (*Act XIV. of* 1882), *Sec.* 316—*Sale in execution —Sale absolute—Death of purchaser—Grant of certificate to his representatives.*

Vinayek Narayen *v.* Dattatraya Krishna Datar.

When a sale in execution has become absolute, the Court can, under S. 316 of the Code of Civil Procedure, grant the certificate prescribed therein to the representative of a deceased purchaser.—1, *Bom. L. R.*, *p.* 645.

Minor—Guardian—Loan of money to guardian—Suit to recover money from guardian, framed on a breach of warranty—Warranty based on a representation—Representation on a point of law.

Shet Manibhai Premabhai *v.* Bai Shri Rupaliba.

The plaintiff lent a sum of money to defendant, the guardian of her minor son. Finding that his claim against the defendant on the original loan would be time-barred, the plaintiff formulated his claim as one for damages arising out a breach of warranty:—

Held, (1) that as the plaintiff knew that the son was an infant and that any representation that the defendant was her infant son's duly authorized agent was incorrect, no warranty such as would support a suit could arise out of such a representation ;

(2) that even if it be concluded that there was a representation as to her power to bind the estate, it was one on a point of law and thus incapable of supporting a suit.—1, *Bom. L. R., p.* 646.

Easement—Right of way—Dominant heritage used for agricultural purposes—Subsequently turned into a timber depôt—Right of way cannot be claimed for the altered heritage—Imposing a greater burden on the servient tenement.

Desai Bhaoorai Ranchhodrai *v.* Desai Chunilal Dahyabhai and others.

The plaintiff and defendants were owners of adjacent fields, and one mode of approaching the defendants' field was by a way which passed through plaintiff's field. The defendants' field was used for agricultural purposes, but lately they converted their field into a timber yard, and the dispute between the parties was whether the defendants could claim to use the way for the new purpose :—

Held, that the defendants could not, by merely altering the dominant heritage, substantively increase the easement.

"The use" must be the reasonable use for the purpose of the land in the condition in which it was while the user took place, so that if the user is for a field devoted to agricultural purposes, the right cannot be claimed for a timber depôt into which the field was converted.—1, *Bom. L. R., p.* 658.

Civil Procedure Code (Act XIV of 1882), S. 295—Assets realised by "sale or otherwise," meaning of—Receiver, appointment of Equitable execution—Rateable distribution—Rents realised by Receiver.

W. R. Fink *v.* Moharaj Bahadur Sing.

Rents of property under attachment realised by a Receiver, appointed at the instance of a decree-holder, are assets realised by "sale or otherwise" in execution of a decree within the meaning of sec. 295, C. P. C.

Assets realised by the appointment of a Receiver after decree, are assets realized by a process of execution provided for by the Code.

The appointment of a Receiver at the instance of a judgment-creditor is equitable execution.

Anglo-Italian Bank v. *Davies* (5) referred to.

Creditors who had applied for execution of their decrees prior to the realisation of the rents by the Receiver were alone entitled to participate under S. 295 and not those who had subsequently obtained attachment.—*C. Weekly Notes, p.* 27.

Receipt, what is a—Penalty for unstamped receipts—Liability of Principal.

Attorney-General *v.* Carlton Bank [1899], 2 Q. B., 158.

A solicitor whose services were specially engaged by a bank and who was bound to devote his whole time to its legal business sued for and recovered money due to it in the performance of his duties as such servant of the bank. From time to time he handed over the moneys so recovered to the Secretary or Cashier of the bank and obtained their initials against the entries of moneys recovered as evidence of payment over to the bank. These initials were sometimes preceded by the words "received" or "entered" and sometimes they stood alone.

On an information by the Attorney-General on behalf of the Government, three questions were raised, (1) whether these records, were receipts and so liable to stamp duty whenever the record referred to the payment of more than £2, (2) whether the bank was liable to pay the penalty, (3) and whether the presence or absence of the preceding words made any difference.

On the first question Lord *Russel*, C.J. held that notwithstanding that there might be some difference between the engagement of an independent solicitor and the employment of a solicitor as the servant of the bank under a special agreement, the difference did not touch the

question of construction as to whether these records given to the solicitor were receipts and that the object of the record being admittedly to acknowledge and evidence the payment of the money as between the bank and the solicitor, the documents constituted receipts within the meaning of the Stamp Act and were therefore liable to stamp duty as such.

On the next point he held that the Company being a limited Company could act only through its officers and that the finding of the jury being that the Secretary and the Cashier of the bank had its authority to receive the money, it was really the bank that received the money and issued the receipts and this, notwithstanding that the intention of the officers was not to act for the bank but to protect themselves against each other.

On the last point he decided that the object in every case being the acknowledgment of receipt, it did not matter what words were used in expressing it or even that no words were used.

[There is no rule that Revenue Acts should be construed liberally in favour of the subject. In all cases the plain and the only rule of construction is to ascertain the intention of the Legislature and give effect to it irrespective of the hardship or inconvenience that may arise from its application.]

Bills of Exchange Act, S. 82—Crossed cheque—Receipt for customer—Conversion—Money had and received.

G. W. Ry. Company *v.* The London and County Banking Co., [1899], 2 Q. B., 172.

In this case a rate collector for some District Councils, on the false representation that a rate had been made, obtained from the plaintiff in payment thereof a crossed cheque marked "not negotiable" payable by a London Bank. The defendant company who were, for over fifteen years, in the habit of cashing a considerable number of cheques presented by the rate collector, took the crossed cheque and paid him its amount in money which he immediately disposed of to his own use. They afterwards sent the cheque to their Branch Office in London and obtained payment from the London Bank. The plaintiff now brought this action against the defendants for the value of the cheque either as money had and received to the plaintiff's use or as damages for conversion of the cheque,

The question was whether the defendants were protected by the Bills of Exchange Act, S. 82, which provides that a banker who in good faith and without negligence receives payment for a customer of a crossed cheque is not liable to the true owner, should the customer happen to have a defective title or even none at all. The determination of this question depended upon whether the rate collector could be considered a customer of the bank and whether the payment made to the defendants by the London Bank was for such customer.

Bigham, J., held that the long course of habit in the cashing of the cheques was sufficient to constitute him a customer, even though he had no standing account nor any passbook or anything of the kind, that the prior payment of the value of the cheque to the collector was only an advance of money in anticipation of collection and did not constitute a purchase of the cheque so as to prevent the subsequent receipt of money from the London Bank from being a receipt for a customer and that the defendants were therefore entitled to the protection afforded by S. 82 of the Act.

[The question whether a person is a customer or no is one of fact to be left to the jury in cases triable with a jury.]

Conversion—Estoppel—Liability of Warehousemen.

Union Credit Bank *v.* Mersey Docks and Harbours Board, &c., &c., [1899], 2 Q. B. 205.

These are three connected cases. In the first case a person who had pledged to the plaintiffs as security for the repayment of a loan eighteen hogsheads of tobacco then in the custody of the defendants' warehousemen, paid the money due upon one hogshead of tobacco, obtained the signature of the plaintiffs to a delivery order with the column relating to quantity left blank on the pretence that some information had to be obtained before the column could be filled up and took delivery of all the hogsheads by fraudulently filling in the blank the words "eighteen hogsheads." In the next case one of two consignments which were pledged to the plaintiffs was redeemed and a duly drawn up delivery order for the same was altered by the insertion of the description of the other consignment in the unwritten space left above the plaintiffs' signature and the defendants were thereby induced to deliver both the consignments. In the last case the person who so obtained possession of the consignment pledged a portion of them to a bank in order to secure an advance made by them. Subsequently the

money was paid and the warrant for the goods which had been deposited with them was returned to the pledgor. All this was done by the pledgee in ignorance of the fraud of the pledgor in obtaining possession of the consignments.

The question in the first two cases was whether the warehousemen were liable, and in the third whether the innocent pledgee was liable, as for conversion of goods.

In the first case *Bigham*, J., held that whatever might have been the intention of the plaintiffs and their explanation of the failure to duly fill up the delivery order, yet having omitted to perform the duty they owed to the defendants of clearly indicating the quantity of the goods to be delivered and directly assisted in the perpetration of the fraud by putting it within the reach of the pledgor to forge the delivery order and thus deceive the defendants, the plaintiffs were estopped from now showing that they did not authorise the insertion of more than one hogshead of tobacco.

In the second case it was contended that it was the duty of the plaintiffs to see that no space was left above their signature and that the space, if any, was crossed by lines so that there may be no scope for forgery and that having helped to mislead the defendants by their failure to do so, the plaintiffs were not entitled to recover. But the Judge held that seeing that the delivery order was in the form in which many such orders usually were when signed by men of business, it could not be said that there was any carelessness on the plaintiffs' part, because they did not anticipate the fraud and provide against it, that even if there was any carelessness, the plaintiffs owed no duty to the defendants to take such extreme precautions and moreover the negligence was not the proximate cause of the fraud and that the defendants were therefore liable to make good the loss of the plaintiffs.

In the last case it was held that the pledgee having had nothing to do with the goods themselves and having on receipt of his money returned the warrant for the goods in good faith and without notice of the fraud practised in obtaining possession of the consignments, he was not liable any more than an ordinary carrier who takes possession of stolen goods from a thief and at the end of his journey receives his charge and returns the goods without any knowledge of the theft.

Railway Company—Fencing—Owner or occupier of adjoining lands—Highway.

Luscombe v. Great Western Railway, [1899], 2 Q. B., 313.

Where a licensee of the owner of a wood depastured his cattle into it and some of them strayed along a highway into the adjoining

railroad and were killed by a passing train it was held by the Court of the Queen's Bench (*Darling* and *Channell*, JJ.) that where the cattle not merely used the highway as a highway for the purpose of passing and repassing from one place to another but strayed about it without a guide they were not the cattle of owners and occupiers within the meaning of S. 68 of the Railway Clauses Consolidation Act even though they were there with the permission of the owner and that the Railway Company were not bound to fence against such cattle. *Manchester, &c., Railway Company* v. *Wallis*, 14 C. B., 213, referred to.

Employer and Workman—Employer's negligence—Defective appliances—Knowledge of Workmen—Agreement to undertake the risk—Liability of Employer.

Williams *v.* **Birmingham Battery & Metal Co.** [1899], 2 Q. B. 338 C. A.

The simple question in this case was whether the employer who had neglected to provide proper appliances could evade liability for the death of a workman by reason of such negligence by showing that the deceased was well aware of the risk and must be presumed to have agreed to undertake the risk. It was held by the Court of Appeal that since the case of *Smith* v. *Baker* [1891] A. C. 325 it was settled law that the knowledge of the risk by itself did not necessarily involve any acceptance of the risk and that there being no finding by the jury that there was any implied or express undertaking to accept the risk, the defendants were bound to compensate the widow for her husband's death.

Execution—Right of retainer of debt—Administration order—Payment of assets to Official Receiver—Ignorance of right.

In re Rhoades, Ex parte Rhoades, [1899], 2 Q. B. 347 C. A.

In affirming the decision of *Wright*, J., in [1899], 1 Q. B. 905 (*see ante* p. 288), the Court of Appeal consisting of the Master of the Rolls Sir *F. H. Jeune*, *P.* and *Romer*, LJ., held that the executor need not assert his right to retain his debt before there was any necessity to do so, that though a creditor with the right to retain the debt had not all the rights of a secured creditor (*Lee* v. *Nuttall*, 12 Ch. D., 61) he had a right as against creditors of equal grade to pay himself fully out of the legal assets in his hands and this right was in no way affected by an administration order in Bankruptcy (*Hasluck* v. *Clark* [1899], 1 Q. B. 699 and *In re Williams*, 8 *Morrel* 65), that though generally ignorance

of law would not be relieved against, *Ex parte James* [1874], L. R. 9 Ch. 609, and *Ex parte Simmonds* [1885], 16 Q. B. D. 308 showed that mistakes of the kind could be set right so long as the money was in the hands of the officer of the Court and that the proof in bankruptcy withdrawn on discovery of mistake and before adjudication could not deprive the executrix of the right to claim the money back.

Liability of Employer—Independent Contractor—Dangerous work on Public Roads.

Holliday v. National Telephone Company

[1899], 2 Q. B. 392 C. A.

A telephone company laying telephone wires under the road engaged a plumber to connect the tubes. The company through their foreman supervised his work and a workman of theirs was helping him in his work. In order to get the flare necessary for connecting the tubes the plumber dipped a benzoline lamp into melted solder and the safety valve not being in working order the lamp exploded and a passer-by was injured. The question was whether the company were liable for the injury. The Court of Appeal (*Earl of Halsbury*, L. C., *A. L. Smith* and *Vaughan Williams*, L.JJ.) in reversal of the decision of the Division Bench held that upon the evidence in the case the injury was caused not by the independent contractor alone (if he was at all an independent contractor) but by him jointly with the defendant's workman under circumstances which would make them both liable for the negligence such as resulted in the injury to the plaintiff in the case and that even if he was an independent contractor, since the cases of *Hughes* v. *Percival*, 8 App. Cas. (H. L.) and *Black* v. *Christchurch Finance Co.* [1894] A. C. 48 P. C. "it is difficult for a person engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway."

Practice—Discovery—Affidavit of Documents, form of—"Containing nothing impeaching the case of the defendants."

Attorney-General v. Mayor, Alderman, and citizens of New-castle-upon-Tyne and Hill Motum

[1899], 2 Q. B. 478 C. A.

This was an information by the Attorney-General against the defendant corporation claiming a declaration of Her Majesty's right to

the foreshore and bed as far as midstream of the river Tyne to the exclusion of the defendants. In answer to one of the interrogatories filed for the examination of the defendants as to the documents in their control or possession, they admitted being in possession of certain documents and said that neither they nor any others in their behalf had any other papers relating to the matters in question. On the application of the informant for further discovery the Divisional Court ordered further discovery by affidavit and production for inspection of the informant, of all documents "except such as the defendant should by his affidavit identify and state to relate solely to the case of the defendant corporation *and to contain nothing impeaching the case of the defendant corporation or* supporting the case of the informant, etc." Against this order the defendants appealed. The question on appeal was whether it was right to require the defendants not simply to state that the documents of which exemption from inspection was claimed related solely to the case of the defendants but to state further that they contained nothing impeaching the case of the defendants or supporting that of the informant. It was contended for the respondents that the order of the Division Court was right, that the case of *Morris* v. *Edwards*, 15 App. Cas. 309 was one in ejectment and stood on a different footing as in such cases the plaintiff had to succeed on the strength of his own title not on the weakness of his adversary's, and that as in this case the presumption was that the Crown had a right to the foreshore unless it had granted it to anybody and any document impeaching the defendant's title must necessarily support the title of the Crown, the statement that the documents did not contain anything to impeach the defendant's title was rightly required in support of the defendant's claim of privilege.

The Court of Appeal (*A. L. Smith* and *Vaughan Williams*, L.JJ.) held that though the case of *Morris* v. *Edwards* was framed in ejectment, the judgments not only did not rely upon it but based the matter on broad considerations which were applicable to all suits of whatever nature they might be and the words "*impeaching the case of the defendants or*" should be struck out. They also said that the word to be used is not "title" but "case" so that the affidavit should declare that the documents related solely to the "case" (not "title") of the defendants and contained nothing relating to the "case" (instead of "title") of the informant.

(*Quære* per *Vaughan Williams*, L.J., whether in cases in which documents impeaching one's title, at the same time go to support the affirmative title of the adversary inspection should not be given.)

Practice—Patent action—Shorthand notes—Payment by solicitor—Solicitor's right to recover from client.

Osmond v. Mutual Cycle and Manufacturing Supply Co., [1899], 2 Q. B. 488 C. A.

The question in this appeal was whether a solicitor was entitled to recover from his client money paid by him for taking shorthand notes in a patent action. At the beginning of the trial the judge asked whether a shorthand note was to be taken. After some discussion the solicitors on both sides agreed with the concurrence of the judge that a shorthand note was to be taken and should constitute the record in the cause and that the parties should share the expense of having it taken. The solicitor paid a moiety of the costs and now sought to recover it from his clients. On the clients' objection both the master and the judge in chambers refused to include this item in the taxation of costs. The objection was based upon the ruling in *In re Blyth and Fanshawe*, 10 Q. B. D. 207, that where the cost about to be incurred is unusual and may not be allowed between party and party, the solicitor should inform, and take the permission of, his client beforehand or he will not be entitled to charge his client with the cost so incurred.

The Court of Appeal (*A. L. Smith* and *Vaughan Williams*, L.JJ.) held that the solicitor was entitled to charge his client with this item of costs.

A. L. Smith, L.J., said that in patent actions which usually involve very complicated and scientific details the cost of taking shorthand notes was not at all unusual and that the clear effect of the agreement between the parties with the sanction of the Court was to make the costs of taking shorthand notes costs in the cause and that therefore the ruling quoted had no application to the case.

Vaughan Williams, L.J., added that apart from the consideration that the cost was not unusual and was chargeable between party and party, there was this additional fact that the shorthand notes constituted the authentic record in the case and were, as such used by the judge and that the solicitor was entitled to charge his client with any costs incurred by him in supplying authentic records for the use of the judge.

Employer and Workmen—Injury—Disabled to earn 'full wages at work at which employed'—Workmen's Compensation Act, S. 1, sub-s. 2 (a), construction of:

Chandler v. Smith [1899], 2 Q. B. 506 C. A.

A foreman in a factory who in addition to his primary duty of supervision also used to set up and adjust machines, was injured in the course of adjusting a machine. He was disabled to do the work there-

after but continued to attend the factory and do his work of supervision and received his usual wages of £3 a week. The question was whether the owners of the factory were liable to pay any compensation to him. The section of the Workman's Compensation Act which provides for compensation to injured workmen contains the proviso that "the employer shall not be liable under this Act in respect of injury which does not disable the workmen for a period of at least two weeks from earning full wages at the work at which he was employed."

The Court of Appeal (*A. L. Smith*, *Rigby* and *Vaughan Williams*, L.JJ.) held that although the foreman did not absent himself for two weeks and although he continued to receive his usual wages, it could not be said that he was not disabled from earning full wages for at least two weeks *at the work at which he was employed* and that his wage-earning capacity as foreman in case he should leave this factory and go to a new one having decreased, he was entitled to a declaration that the employer should be liable whenever his wages should diminish *by reason of this accident*, the amount of compensation, and the time during which it should be payable being left to future determination.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks receipt of the following publications :—

The Law Students Journal from January to November 1899, (*in exchange*).

The Law Students Helper for November 1899, (*in exchange*).

The American Lawyer for November 1899, (*in exchange*).

Case and Comment.

The Quarterly Advance sheets of the yearly Digest, published by the Lawyers' Co-operative Publishing Society (*in exchange*).

The Lawyer, (*in exchange*).

Sind Sadar Court Reports, Vol. 1., No. 4 (*in exchange*).

The Bombay Law Reporter for October and November (*in exchange*).

The Albany Law Journal for October and November (*in exchange*).

The Calcutta Weekly Notes for October and November (*in exchange*).

The Allahabad Weekly Notes for October and November (*in exchange*).

The Green Bag for October and November (*in exchange*).

The Canadian Law Times for October and November (*in exchange*).

The Educational Review for October and November (*in exchange*).

The Canada Law Journal for October and November (*in exchange*),

The Kathiawar Law Reports for November (*in exchange*).

The largest incomes at the bar:—According to a London weekly, the incomes of the 150 practising Queen's Counsel scarcely average $5,000 per year. Mr. Balfour Browne is said to enjoy the largest—£30,000 a year. Samuel Pope, Mr. Cripps, Mr. Pember and Sir Edward Clarke make about £15,000 each.—*The American Lawyer.*

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Marriage by one having sexual disease:—The Michigan Legislature has recently passed a law forbidding the marriage of any person suffering from infectious or transmissible sexual disease. The law states that any one so diseased who may marry shall be guilty of felony punishable by a fine of not less than $500 or more than $1,000, or imprisoned for a term not exceeding five years, or by both fine and imprisonment.—*The American Lawyer.*

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Are patients to be kept alive at all hazards:—Judge Simeon E. Baldwin, of New Haven, president of the American Science Association, in a much discussed address recently delivered before that body, took occasion to censure the practice of physicians in keeping the patient alive at all hazards for the longest time possible and irrespective of the amount of suffering involved. In the course of his remarks, he observed:

"In civilized nations, and particularly of late years, it has become the pride of many in the medical profession to prolong such lives at any cost, discomfort or pain to the sufferer, or of suspense or exhaustion to his family.

"The patient has come to a point where he cannot bear the thought of eating. The throat declines to swallow what the stomach is no longer able to digest. He craves nothing but to be alone. A few hours, and nature will come to his release. She is already, perhaps, fast throwing him into that happy unconsciousness of pain which we call lethargy. The vital forces have been spent. The main spring is broken and the watch has run down. It can be made to tick feebly for a minute or two by shaking it hard enough; but *cui bono*? Only another main spring can mend it. Only another soul, another world, can give value to this human life that is ready to flicker out because it is worn out.

"The family ask the doctor if there is no hope and he responds with some sharp stimulant; some hypodermic injection; some transfusion or infusion to fill out for a few hours the bloodless veins; some device for bringing oxygen into the congested lungs that cannot breathe the vital

air, some cunning way of stimulating some other organ to do the stomach's work. The sufferer wakes to pain, and gasps back to a few more days of life.

"Were they worth the having? Do they bring life, or a parody of life? Has nature—that is, the divine order of things—been helped or thwarted? For the time, thwarted, but not for long. The suffering, or at best, the lethargic existence, has been successfully protracted, but the body will soon falter and fail in the unwonted functions forced upon parts of it made for other uses, and death comes, to the relief of the dying and living, alike.

"Nature has kindly smoothed the sufferer's pillow by leading the way to that gradual exhaustion of the vital powers which follows the refusal of the stomach to receive or to digest food.

"To force nutriment into the system in such a case through other channels is simply to prolong a useless struggle at the cost of misery to the patient and to the profit of no one but the doctor and the nurse."

"In determining the nature of a disease, we look for the cause to the symptoms

"Nature has so ordered it that symptoms are observed at that time of life when life is most worth saving. A lesion of one organ may then be expected to produce a reaction throughout the system. There is a general sympathy of the parts. On the other hand, in old age the outward manifestations of an interior lesion seldom indicate that more than one organ is affected,and are often hardly noticeable at all. The patient does not know that he is a patient. There is no occasion that he should. The weakest part of his bodily mechanism has broken down. Why patch it up? Another is hardly less weak, and must soon succumb. Better for him and for his friends that his last days should be unclouded by the apprehension of coming death, and the change come to him quietly as a dream in sleep.—*The American Lawyer.*

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Property in Air.—An extremely delicate point in law, and one which will greatly interest bicycle riders, has just been brought up at Mansfield, Ohio. It appears that a man while recently wheeling about the suburbs noticed that one of his pneumatic tires was becoming soft. He explored his toolbag but found that his pump was missing. It had been purloined by his wife, though this fact has nothing to do with the matter in hand. Fearing evil consequences for the tire, he turned in at a convenient repair shop and mentioned the difficulty.

The repair man immediately pumped up the tire, and the rider thanked him and was about to leave when the man demanded five cents.

The wheelman explored his pockets, but discovered that he had either neglected to transfer his money to his bicycle garments or that his money had gone in company with his pump—though this point, also, however interesting it may be to married men, has no bearing on the present case.

The bicycle owner explained the situation to the man, produced a visiting card and promised to step in the next morning with the money. The bicycle man replied, in effect, that he wasn't born yesterday, that there was much crime stalking abroad, and that he must insist on immediate settlement. The other made a reference to the notoriously anæmic condition of a stone, and told the thrifty repairer that if he didn't choose to wait for his pay, he could open the valve and take out the air which he had inserted, but that if he took more, even to the extent of the twentieth part of one poor scruple, as Portia remarked to Shylock—nay, if the valve did hiss too much but in the estimation of a hair, he would have the law on him.

The bicycle man more hardy than the Jew of Venice, with a remark that his deeds were upon his head, wrenched off the cap and punched the valve with a shingle nail. There was an ominous hiss. He punched again, but the valve refused to close. The air all escaped, and the cyclist, with observations which led the bystanders to believe that the quality of mercy was going to be badly strained, trundled his bicycle home.

The next day the matter was brought into court by the wheelman suing the repair man for damages. The repairman made a counter-claim for his five cents. Each had provided himself with learned counsel and legal lore of considerable value transpired. Early in the proceedings the wheelman's lawyer set up the contention that there could be no property rights in air, that it existed, so to speak, *fera natura*, and therefore the bicycle man's claim of five cents could not lie.

Counsel for the repair man rose to point out what the intelligent court must already know, to wit, that his learned opponent was an ass. That air in its native state, blowing where it listeth, is, of course, free to all, and can be lawfully seized of none: but that condensed air is a manufactured product as much as artificial ice, or bricks, or the sheep-skin diploma which in some inscrutable way his able opponent had become possessed of.

The court acquiesced in this view of the case.

Counsel for the rider said he bowed to the superior knowledge possessed by his scholarly opponent concerning wind, and asked leave to add ten cents to the claim of his client, he estimating that there was

merchantable atmosphere in the tire to that amount when his said client entered the shop. Counsel for the repair man responded by giving notice that he should prosecute the plaintiff for obtaining goods under false pretences, to wit, five cents' worth of condensed air, when he knew, or ought to have known, that he had no money with which to pay for it.

Counsel for plaintiff said that no married man could know when his wife had been through his pockets, though no doubt the wife of his learned brother had given up the practice years ago, never having found anything.

The learned brother replied by admitting that when he put his hands in his pockets he was not usually rewarded by finding much cash, but that so far he had managed to keep his hands out of other folks' pockets, a practice his esteemed opponent would do well to follow.

At this point the court rapped for order and announced the decision —five cents' damages for plaintiff, and judgment for five cents for the defendant, the costs to be shared equally. Learned counsellors collected ten dollars each from their respective clients and went away arm in arm; and the equal and exact justice before the law obtainable by all men was again vindicated.

All of which should furnish much food for thought to married men, bicycle riders and repairshop proprietors.—*Hayden Carruth, in Saturday Evening Post, Philadelphia*

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Trusting the Legislature:—To curb the power of legislatures is the central idea of most persons who distrust the common people. This is a fundamental error. Within the long-established lines of our constitutional freedom the legislatures ought to be left free to speak the will of the people. Temporary mistakes and serious mistakes have been made and will be made by our legislatures. But they represent the public; and any attempt to deprive them of the power to determine the great questions of public policy which legitimately belong to the law-making department is not only unwise, but hopelessly futile. The great constitutional guarantees of life, liberty, and property are sufficient protection to the individual without straining them beyond their proper scope. There is a constant pressure on the courts for the annulment of obnoxious statutes, but while the judges sometimes go beyond their proper functions and attempt to revise the legislative discretion, they generally keep within the constitutional boundaries of judicial power with admirable judgment. They clearly teach that the remedy for bad legislation is better legislators. It cannot be too often, too

plainly, or too emphatically repeated that popular government cannot go on toward perfection without leaving to the legislatures, with all their capacity for mistakes and folly, the full measure of legislative power. Legislative mistakes must be corrected by better legislation. To put the legislature under guardianship would indicate the failure of government by the people. If people are fit to govern themselves, they can choose legislators who are fit to make laws.—*Case and Comment.*

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Is a mustache property?—If so, what is its value? These points will be raised in a very peculiar suit which is coming up at the next term of court in a town in Georgia. The facts are briefly these: almost a month ago a well known travelling man was staying at the leading hotel of the place, and went to the cigar stand one day to get a light. They had a new-fangled concern that spouted out a jet of flame when the lighter was lifted, but on this particular occasion it hung fire. The drummer way trying to make it work, when all of a sudden it blazed out like a volcano and licked off his long, beautiful blonde mustache. He was furious, of course, because the mustache had been his chief ornament and pride, but the affair might still have passed off without trouble if he hadn't been so unmercifully chaffed. The upshot of this was that he demanded damages. The landlord laughed at him, and he then instructed a lawyer to bring a suit for $2,500. The paper will be filed in the next term of court, and will contain some interesting allegations. It will be claimed that the mustache was of direct assistance to its owner in earning a livelihood, insomuch as it gave him a distinguished appearance, and thus faciliated his interviews with the trade. Its loss, he holds, was a disfigurement which has occasioned ridicule, falling off in prestige and consequent shrinkage in business. He will also allege that his altered appearance caused great mental anguish to himself and his wife, and that that species of suffering may be reduced under the law to dollars and cents. Incidentally he will try to prove that the absence of a mustache affected his eyesight. So, as one may observe, a good many interesting and delicate questions will be raised, and doubtless the case will attract wide attention. What sort of defence will be set up remains to be seen.—*The Albany Law Journal.*

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Duty to stop Train for fallen passenger:—A novel decision was rendered in *Reed Louisville & N. R. Co.* (Ky.) 44 L. R. A. 823, holding that when a passenger is thrown or pushed from a train without any fault of his own, it is the duty of the railroad company to stop the train and

rescue him if the circumstances are such that he is liable to perish or suffer great injury unless rescued, provided that this can be done without imperiling the other passengers, and that the trainment could not provide for his rescue by other means. The fact that a passenger has, by accident or the wrong doing of others, been thrown from his train, will not terminate his relation to the carrier. That he may be a passenger before he enters the train is well established by the cases cited in the note to *Webster* v. *Fitchburg R. Co.* (Mass) 24 L. R. A. 521. It is equally certain that he may continue to be a passenger after leaving the train, as is shown by all the cases concerning injuries to a disembarking passenger on account of defective platforms and premises. The duty of the railroad company to care for persons thrown from trains upon its track and in such condition as to be in danger of being killed by other trains has also been enforced in Cincinnati, *I. St. L. and C. R. Co.* v. *Cooper* (Ind.) 6 L. R. A. 241, and *Cincinnati H. & D. R. Co.* v. *Rassen* (Ohio) 16 L. R. A. 674. These decisions, although forming a new class, are abundantly justified by the fundamental principles which govern the duties and liabilities of common carriers.

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Ideal of the Good Lawyer.—For your exemplar let me commend the ideal of a good lawyer, I do not say the great, but the good, lawyer, an ideal that has been realized in the life of every substantial city and court-house town, especially in the older neighbourhoods. A man of kindly and benignant disposition, friendly alike with his well-to-do and his poorer fellow townsmen, acquaintance with their habits and individual history and with a pretty accurate knowledge of their opinions and prejudices, as well as of their ways and means; genial and sociable, yet dignified and self-contained, and of staid and comfortable appearance; in manner alert, in conversation always moderate and respectful; shrewd in his observations, wise, but with perennial humor and love of pleasantry; as a citizen always concerned and active in the interests of his town, his State, and his country; not an agitator nor a perpetual fault-finder, nor giving out the intimation that he is better or wiser than others, but ready to confer, to adjust, to agree, to get the best possible, if not the utmost that is desirable. To him the people turn in local emergencies for guidance and counsel on their public affairs, even partisanship fearing not to trust to his honor and wisdom; so free from all cause of offence that there is no tongue to say a word against his pure integrity; too dignified and respectful to tempt familiarity; too genial and generous to provoke envy or jealousy; revered by his brethren of the bar; helpful and kindly to the young; in manner suave and

polite, with a fine courtliness of the old flavor which Clarendon described in John Hampden as a flowing courtesy toward all men; successful of course in his practice, but caring less for its profits than for the forensic and intellectual delight which the study and practice of the law bring to him. He knows much of the old "learning in the law," can tell of fines, of double vouchers and recoveries, of the "rule in Shelley's case," though he keeps all these things in mind as collectors treasure their antiques and curios, more as objects of art and historical interest than of practical utility. His mind is grounded upon the broad and deep principles of jurisprudence rather than upon "wise saws and modern instances," but over all is reflected the illumination of a strong common sense and a refined tactfulness.

In the judgement and feelings of the community there is something of the venerable and illustrious attached to his name, not for his learning in the law, not for his success as an advocate, nor for his mere usefulness to his fellow-citizens as a counselor and guide, but for the benignant influence of his whole life and character, and when he dies, to every mind there comes a suggestion of epitaph that shall most fittingly preserve the estimate which the people have formed of him: "The just man and the counselor."—*From the address to the graduating class of Yale Law School on June 26, 1899, by Mr. Griggs, Attorney-General of the United States.*

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Some Well-known English Judges:—In the memorials of Sir Roundell Palmer, the Earl of Selborne, we find some interesting and freely spoken remarks regarding the characteristics of the judges of his day. He says:—

"The Judges before whom I practiced in my younger days were Lord Cottenham and Lord Lyndhurst, Lord Langdale at the Rolls, Sir Lancelot Shadwell as Vice-Chancellor, and Lord Abinger and Baron Alderson on the equity side of the Court of Exchequer. Among these, Lord Cottenham and Baron Alderson were (judically) pre-eminent. Lord Cottenham was not brilliant, but he was one of the best lawyers who, after Lord Eldon's time, sat in the Court of Chancery. He heard arguments patiently, and the public had confidence in his judgments. He was a silent, reserved, and not very sociable man; by no means free from personal antipathies and political prejudices. But of myself he took kind notice, though I was not on his side in politics. I was one of the few juniors who were sometimes honored by invitations to his house; and on at least one occasion the marked attention which he paid to an argument of mine was useful to me with clients. Lord

Lyndhurst (as all the world knows) had the shining qualities, and the graces of manner, which Lord Cottenham entirely wanted; but he was not, within the sphere of my observation, great as a judge. My knowledge of him in that character was only during the last Chancellorship, from 1841 to 1846; when he took things very indolently and easily affirming almost indiscriminately the judgments brought before him on appeal. It was depressing to argue before a Chancellor whose heart did not seem to be in the business; however famous he might be as an orator or a statesman.

"Lord Langdale and Lord Abinger did not, upon the bench, altogether maintain the reputation which they had gained at the bar. Lord Langdale was dignified in manner—perhaps a little too much so; he was conscientious and painstaking, and much more independent than Sir Lancelot Shadwell. But it was not possible to avoid comparisons between him and the leading counsel in his court, Pemberton Leigh, unfavorable to the judges; nor was the case much mended when George Turner succeeded to Pemberton Leigh.

"Sir Lancelot Shadwell (of whom I shall presently say more) was a very kindly and good-humored, but a weak and rather eccentric, man. A story was current of his answer to somebody, who suggested that a judge must feel very anxious indeed, when he had to decide questions involving property of large value. "Not at all," he was reported to have said; 'one or the other of them must have it; what does it signify which?' It was with reference, probably, to this story, that a humorist wrote his epitaph while living: 'Here lies Sir Lancelot Shadwell, sometime Vice-Chancellor of England: What does it signify?'

"Baron Alderson was strong, vigorous, humorous, and very warm-hearted; a complete master of the law.

"The principal danger to a very successful advocate is arrogance. The great nursery of that fault, in my early days, was the Vice-Chancellor of England's court. Leach, an extremely clever man, who had presided over that court before my time, was himself very much noted for vanity. On his translation to the Rolls, he was succeeded by Shadwell, of whose nature it seemed to be a necessity to be governed by somebody. So remarkable was that weakness in him, that, whenever the principal leader of his court happened to be elsewhere, he surrendered himself to the nearest competitor, until the leader came back and resumed the command. The tyranny which successive leaders exercised over Shadwell would be inconceivable to those who did not witness it. The earliest of them was Sugden, whom I only knew after

he had left the bar,—a very clever man, profound in conveyancing and case-law; waspish, overbearing and impatient of contradiction. In Ireland, where everybody did homage to his superiority, he made a good judge; but in England, both as Chancellor and in the House of Lords, the quality of his judgments suffered from his inability to endure a brother near the throne. From him, the sceptre passed to Knight Bruce,—clever, witty, of quick penetrating discernment, generous to and liked by juniors, and with much miscellaneous knowledge of other things as well as law, which he had picked up for himself; for he was not a public school or university man. The seeds of mutual dislike between him and Lord Cottenham were sown when that great lawyer, plain and dull of speech, had to endure what he regarded as daily affronts from his eloquent competitor. They bore fruit when the one sat as Judge of Appeal over the other; for, if Lord Cottenham did not approach his judgments with a disposition to reverse them, it was scarcely a less evil that Knight Bruce thought he did. Those judgments suffered, as contributions to the science of the law, from the strong marks of his personality which were impressed upon them. He was a sound lawyer, and never lost the thread either of facts or of arguments. But his judgments were generally short, sententious and dogmatic, and when studied and elaborate, they were apt to have a flavor of rhetoric, and sometimes humor—admirable in itself, but less appropriate on the judgment-seat than elsewhere.

"When Sir James Knight Bruce became one of the additional Vice-Chancellors appointed in 1841, he was succeeded, as Lord of Sir Lancelot Shadwell's Court, by Bethell. In the exercise of that power, Bethell was more audacious and less ceremonious than either of his predecessors. Whenever things seemed to be going against him (as was liable occasionally to happen, when he was compelled by other engagements to leave cases for a time in the hands of his juniors), he was not careful to preserve so much even as an appearance of respect towards the judge; which Knight Bruce had always done. This habit of imperiousness was a drawback upon his later triumphs, and in the end contributed to his fall. So great was his antipathy for Knight Bruce, that, when Chancellor, he would never sit with the Lords Justices, of whom Knight Bruce was then one;—an arrangement with which they, on their part, were not dissatisfied."—*American Law Review.*

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How can a Lawyer argue for a Client whom he thinks wrong?—

The Earl of Selborne, whose character and position give his words authority, thus answers the question :—

"A question of casuistry has often been raised, which was propounded to me by Patrick Cumin (secretary to the Education Department of tho Privy Council), through my brother Edwin, in 1845. 'How,' he asked, 'can a lawyer arguo for a client whom he thinks wrong?' This was never to me a practical difficulty. The duty of a lawyer, under such circumstances, has, of course, its limits. He should always, and then more than ever, be on his guard against offering to make himself witness as well as advocate, and to corroborate his arguments by any statement or insinuation of personal belief. But it is the right, even of those who are most in the wrong, to have the benefit of a fair and public trial according to law, and to have their evidence properly laid before judge or jury, and the arguments which can honestly be advanced on their side skilfully and fairly stated. It is the advocate's part to do this. If he were to refuse to undertake any case of which, upon the materials before him, he might have formed an unfavorable opinion, he would not be a minister of justice, but the reverse. Not only would he be encroaching upon the office of the judge, and doing what (if all other advocates did the same) would, before and without trial, practically shut out the client from having his case fairly presented, but his judgment might, after all, be mistaken. It has happened to me, not very seldom, that the end of a case has been contrary to my first impression of it, and that I have, nevertheless, been satisfied that justice was done. In the greater number of cases, the result is in accordance with the expectations of counsel; but the client, if he suffers a merited defeat, has had that unobstructed access to the seat of justice which is every man's right".—*American Law Review.*

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Lord Chief Justice Russel on Legal Education:—Lord Russell, of Killowen, recently delivered an address in the hall of Gray's Inn, in connection with the Moot Society of that Inn, which was thus condensed in the *Law Journal*:—

Lord Russell of Killowen said he would apportion his remarks among three topics—legal education, the moot system, and the best mode of argument in court. Referring to the keen interest he took in the improvement of legal education, he disclaimed all thought of depreciating the efforts made by the Council of Legal Education or the abilities of the various readers and lecturers. But legal education could only be imparted properly by a permanent body partaking of a collegiate character. The best lecturers could not be had under the present system, in which a man was a professor to-day and to-morrow was not. The men must be secure in their position, and must devote themselves

to a special branch of the law. They must specialize like other scientists. He referred to the recent discussion as to the admission of aliens to the English bar, and commended the wise resolution of the Benchers of the four Inns to admit them. He eulogized the professions of architecture, medicine, etc., for admitting to their ranks men of all nationalities. Thereby the profession was enriched, and "we of the bar" have nothing to fear from competition. The more the merrier. Every student who studied here became, when he returned to his own country, a missionary to inculcate the excellence of the English Law and the English civilization. Our law combined the highest individual freedom with the greatest well-being of the community. He strenuously urged them all to aspire after the highest ideals in everything. Turning to the question of moots, he paid a merited tribute to Gray's Inn as being the last to discontinue those ancient exercises and the first to revive them, and he hoped that the time was not far distant when they would form an integral part of the qualifications necessary for call to the bar. The bar had great privileges, and it should endeavour to prove itself worthy of them. A barrister of seven years' standing was eligible for almost any post, except that of archbishop or admiral. The third part of his discourse was that which perhaps best pleased his audience. Indeed, it may be said that his generous welcome to strangers was received with something like a sigh by those who know how keen is the competition at present. Arguments, he said, should be clear, simple, direct and fair. The advocate should have the judicial faculty, and be able to view his adversary's case as well as his own. He must be astute to detect the turning point, and mass on it all his strength. The best arguer *in banc* was, in his opinion, the late Lord Chief Justice Mellish, and his excellence was chiefly due to two causes—he cited but few cases, and he was very concise. He eulogized the advice which Sir William Follett gave to the late Lord Coleridge when about to join the bar: "In stating your own case, never neglect to state your opponent's case also, for it is most probable you will do it less favorably than he himself would." Three kinds of arguments were to be avoided. There was what he would style the "Plunge-into-the-cases argument." Before meddling with cases the advocate should inform himself what was the principle of the question, and next, what were the facts of the particular case. In this connection he recounted an experience of his own at the bar. It was in 1861, during the American War, and was a question of blockade running. He had amassed a quantity of cases and was about to cite them before Lord Westbury when that judge counseled him first of all to get hold of the facts of his case, and then, perhaps, he would discover how small a proportion of his cases were really in

point. Then there was the "Promissory argument." Some counsel would say, "I don't mean, m'lud, to deal with this point just now, but later on I hope," etc. Lastly, there was the "Cocksure argument," and it was, in its own way, the most reprehensible of all. Positive people were seldom right.—*American Law Review.*

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Talfourd on forensic qualities:—"A sense of truth is ever in his [the advocate's] way. It breaks the fine, flimsy, gossamer tissue of his eloquence, which but for this sturdy obstacle might hang suspended on slender props, to glitter in the view of fascinated juries. It is seldom that a young barrister can employ the most efficacious mode of delighting his audience unless he is nearly on a par with them, and thinks, in honest stupidity, that he is pouring forth pathos and wisdom." This is a fairly arguable question. But Talfourd was probably speaking out of the fullness of his experience, and no doubt he occasionally felt punctiliousness to be an inconvenient virtue when endeavouring to convince the twelve British shopkeepers.—*American Law Review.*

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Restitution of Conjugal Rights: Husband not bound to receive a wife back who is addicted to promiscuous kissing:—We have recently called attention to the increasing number of suits for the restitution of conjugal rights which come before the Probate, Divorce, and Admiralty Division of the High Court of Justice in England. A case of this character was lately tried before Sir Francis Jeune and a jury, in which the husband objected to taking his wife back because she was too much addicted to the kissing habit. She had a liking for the stage and the society of actors, and allowed several of the male actors to kiss her. These gentlemen, however, insisted that no inference of immorality should be drawn from their conduct or that of the lady in this respect, one of them testifying that he kissed at the ladies of the company to which he belonged and called each one "My dear." In charging the jury the judge characterized this witness as "a young scapegrace, whose chief occupation, according to his own showing seemed to be putting his arms around the ladies of the company and kissing them." The jury refused to compel the husband to receive his wife back into his home, not, however, because of the kissing, but on account of graver offences which the evidence established againt her.—*New York Sun.*

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The Punjab Chief Courts Act of 1899.

Act XXV of 1899 has amended the Punjab Courts Act (XVII of 1884) in some important points as regards second Appeals and Revision Cases.

The new provision which is substituted for S. 40 of the old Act is as follows :—

"40. A further appeal shall lie to the Chief Court in any of the following cases from an appellate decree of a Divisional Court on any ground which would be a good ground of appeal if the decree had been passed in an Original Suit, *viz* :—

(*a*) In a small cause or unclassed suit,

i. If the value of the suit is Rs. 1,000 or upwards or the decree involves directly some claim to or question respecting property of like value and the decree of the Divisional Court varies or reverses otherwise than as to costs the decree of the Court below : or

ii. If the value of the suit is Rs. 2,500 or upwards or the decree involves directly some claim to or question respecting property of like value.

(*b*) In a land suit,

i. If the value of the suit is Rs. 250 or upwards or the decree involves directly some claim to or question respecting property of like value and the decree of the Divisional Court varies or reverses otherwise than as to costs the decree of the Court below :

ii. If the value of the suit is Rs. 1,000 or upwards or the decree involves directly some claim to or question respecting property of like value."

Section 70 of the Act as amended runs as follows :—

"70. (1) The Chief Court may call for the record of any case in which no appeal lies to it and may pass such order in the case as it thinks fit,

(*a*) if the Court by which the case was decided, appears to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested or to have acted in the exercise of its jurisdiction with material irregularity ; or

(*b*) if on application made to it, the Chief Court is of opinion that there is an important question of law or custom involved and that such question requires further consideration.

Provided as follows :—

(1) No application under clause (*b*) shall be admitted after the expiration of 90 days from the date of the order in respect of which the application is made unless the applicant satisfies the Chief Court that he had sufficient cause for not making the application within that period.

(2) No such application shall be admitted in a small cause under the value of Rs. 1,000 or in an unclassed suit under the value of Rs. 200.

(3) On any such application the Chief Court shall not review the decision of the Court below except in so far as such decision involves the question of law or custom in respect of which the application has been admitted and

(4) When any application has been admitted the Chief Court shall subject to the last foregoing proviso treat the matter of the application as if it were an appeal.

Explanation.—A question of procedure is not a question of law or custom within the meaning of clause (*b*).

The effect of the above provisions is that there is no right of second appeal or of revision in suits of small causes of less value than Rs. 1,000.

In small cause suits of the value of above Rs. 1,000 and below Rs. 2,500, a second appeal lies where the decree of the Divisional Court varies or reverses except as to costs the decree of the Court of first instance.

In land suits where the value of the subject is below Rs. 250 there is no second appeal.

If the value is Rs. 250 or upwards and below Rs. 1,000, the decree of the Divisional Court must to give a right of second appeal vary or reverse others than as to costs the decree of the first court."

The provision that there shall be no second appeal or revision as regards all suits of small causes of less value than Rs. 1,000 is a drastic measure likely to cause hardship in many cases. The Civil Procedure Code fixes Rs. 500 as the limit for second appeals and in all suits of whatever value tried under the Provincial Small Cause Court Act, S. 25 gives a salutary power to the High Court to interfere by way of revision on questions of law. The reason of the Bill the Hon'ble Mr. Rivaz says in justification of the measure is that the Chief Court is unable to cope with the work which comes to it under the existing system. "The privilege which is said to be so highly prized by the Punjabi litigant, of being able to get his case heard by the highest court of the province is one which under present conditions takes a pretty long time to attain for him. If the existing system of appeal were maintained, the Chief Court would have to be strength-

ened even above its present number of judges and this is out of the question." The reasons given can scarcely be regarded as satisfactory. In this country for a long time to come the volume of litigation in suits of small value will necessarily be large as it is dependent upon the material condition of the people which is comparatively speaking low. It must also be remembered that the value of a suit to the litigants concerned does not always depend upon its pecuniary value and the results in some classes of suits have far-reaching importance, in some rent suits for instance, and aggrieved parties, must have in suitable cases some means of invoking the judicial determination of the highest court in the Province. The Lieutenant-Governor referred to this question as follows :—"The money limit for further appeals as of right is therefore not a new feature. It is borrowed from the existing Act, and though it may not be logically defensible in the abstract, its justification lies in the fact that the Legislature has to devise a compromise between two needs and that it furnishes a simple and practicable means of shortening the cause of a large section of the less important class of litigation of the Province." There is a disposition on the part of the responsible officers of Government to regard as an unhealthy sign of the times and as due to a spirit of mischievous litigation, the fact that the legal business in a province has outgrown the capacity of the courts originally constituted to work it off. We venture to think that this is a mistake. The progress of the country as a whole, the awakening of people to their rights, the opening of new industries and occupations since the time when the courts were first organised are all factors to be reckoned with and they are bound to multiply the causes that come for determination before the courts. It is, therefore, a very unsatisfactory feature of the new Act that it has enacted a procuration rule for the elimination of causes that have to come up before the Chief Court for appeal at revision.

In the matter of second appeals the Punjab Courts Act contains two provisions which are a distinct improvement upon those contained in the Code of Civil Procedure. They are (1). The court hearing the 2nd appeal has the right to re-open questions of fact as well as questions of law or custom. The want of a similar provision in the Civil Procedure Code has been much felt so far at least as this Presidency is concerned. We have come across many cases in which elaborate and well-considered judgments of courts of first instance have been reversed on questions of fact by most perfunctory and unsatisfactory judgments of District or Subordinate Judges upon which the law sets the seal of finality. Curiously enough some objection seems to have been advanced in the Punjab as regards the system of allowing an appeal on the whole case including the facts. The Honourable Mr. Rivaz says with reference to it. "Firstly, there is a strong

weight of opinion that the time has at all events not yet come for altogether abolishing the present special system in the Punjab of allowing a further appeal in the facts especially in land suits as well as on points of law or custom; secondly, the law of second appeal as at present contained in the Civil Procedure Code has been declared by many competent authorities to need amendment and its revision will in all probability be shortly taken in hand." We hope for a speedy fulfilment of the announcement contained in the last sentence.

2. The second point on which the Punjab Court Act differs with advantage from the Civil Procedure Code as regards second appeals is that in certain suits the value of the subject matter of which does not of itself give a right of second appeal, there is a right of second appeal if the first appellate court reverses or modifies except as to costs the decree of the court of first instance.

Having regard however as the Lieutenant-Governor admits "to the peculiar conditions of the Province which is mainly one of small peasant proprietors whose rights are regulated by a body of custom not yet codified nor even fully ascertained by judicial decision," we cannot approve of the prohibition of a second appeal in all cases of suits relating to land where the land is below Rs. 250 in value or when the land is between Rs. 250 and Rs. 1,000 in value unless the first appellate court reverses or modifies the decree of the first court, even although an important question of law or custom may be involved therein.

NOTES OF AMERICAN CASES.

A rule of a railroad company that a baggage master shall not receive baggage into the baggage room until a ticket shall have been procured is held, in *Coffee* v. *Louisville & N. R. Co.* (Miss.) 45 L. R. A. 112, to be an imposition on the public, unreasonable, and void.

An agreement by which an attorney is to bear the cost and expense of litigation, in consideration of an interest in the recovery, is held, in *Geer* v. *Frank* (Ill.) 45 L. R. A. 110, to be champertous and void, and such an agreement with one of two attorneys, included in a contract made with both of them jointly, is held to invalidate the entire agreement with both of them.

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The imposition of a sentence in a criminal case in excess of what the law permits is held, in *Re Taylor* (S. D.) 45. L. R. A. 136, not to make the sentence entirely void, but to leave the legal or authorized portion operative. With this case is an extensive note reviewing the Federal, state, and English decisions on the effect of excessive sentences.

Damages for mental anguish caused by negligent failure to deliver promptly a telegram stating that a person has been killed are held recoverable in *Cashion* v. *Western Union Teleg. Co.* (N. C.) 45 L. R. A. 160, although the message was sent by an agent, without disclosing who sent it or the relations of the sender with the addressee.

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The existence of a debt due by the drawee of a bill of exchange to the payee is held, in *Citizens' Bank* v. *Millett* (Ky.) 44 L. R. A. 664, to constitute a sufficient consideration to bind the drawer upon his promise to pay the bill and render him liable for the amount, although he was a stranger to the debt.

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Owners of property so near to a house of ill fame that their enjoyment of their property is affected by disgusting sights and sounds in such house are held, in *Blagen* v. *Smith* (Or.) 44 L. R. A. 522, to sustain an injury different in kind from that which is suffered by the public at large, and therefore entitled to an injunction against the maintenance of the nuisance.

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Children to whom a policy of insurance on their father's life is payable if their mother be not living at his death are held, in *Voss* v. *Connecticut Mutual L. Ins. Co.* (Mich.) 44 L. R. A. 689, to have a vested, although contingent, interest, and on the death of one of them before his mother's death his interest is held to descend to his widow and children.

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The question of the existence of an extraordinary occasion of sufficient gravity to justify a call for an extra session of the legislature is held, in *Farrelly* v. *Cole* (Kan. (44 L. R. A. 464, to be a matter for the determination of the governor alone in the exercise of his discretion as a sworn officer, and this discretion cannot be challenged or reviewed by the courts.

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The rule that an employer is not liable for the negligence of an independent contractor is denied application in *Bonaparte* v. *Wiseman* (Md.) 44 L. R. A. 482, where a contractor is employed to excavate a lot close to a neighbour's house in a populous city, but the proprietor is held liable to see that in doing the work due care is taken to protect the neighbour's wall, or timely notice given him to protect it.

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Permitting a shivered pane of glass to remain in a window above a street where pedestrians are frequently passing, when there is an apparent danger of the pieces falling or being shaken out by the wind or otherwise, is held, in *Detzur* v. *B. Stroh Brew. Co.* (Mich.) 44 L. R, A. 500, to be such negligence as will create a liability to a person who is struck by a piece of the glass while on the sidewalk below the window.

The maintenance of dangerous machinery on private grounds unprotected from visits of trespassing children, is held, in *Biggs* v. *Consolidated Barb-Wire Co* (Kan.) 44 L. R. A. 655, to render the owner of the land, who has knowledge that children and others are accustomed to frequent the grounds and climb upon structures which support the dangerous appliances, liable in damages for an injury to a boy caught in the machinery and killed.

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For the damages caused by the erection of a pest house near the residence of a person, it is held, in *Clayton* v. *Henderson* (Ky.) 44 L. R. A. 474, that a city is liable, notwithstanding the fact that it is erected within a mile of the city [in violation of a statute which expressly makes the officers liable, without declaring that the city is liable.

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A surety who has been obliged to pay the obligation is held, in *Pace* v. *Pace* (Va.) 44 L. R. A. 459, to have the right to prove the entire debt against the insolvent estate of his co-surety and receive dividend upon the entire debt until reimbursed with half of the common burden which belonged to the co-surety.

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The right of a city to take a bond from a street contractor to keep a street and pavement in repair for five years after performing the contract is denied in *Portland* v. *Portland Bituminous Paving & Imp. Co.* (Or.) 44 L. R. A., 527, when the bond covers in effect all injures liable to arise from whatever source, and is not limited to defects in the performance of his contract. With this case is a note collating the decisions on the power of a city to bind a contractor to repair a pavement which he makes.

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The offer of a reward for testimony that shall secure the conviction of persons who set fire to buildings within city limits is held, in People *ex rel. Maynard v. Holly* (Mich.) 44 L. R. A. 677, to be within the general power to make regulations for the safety and general welfare of the inhabitants.

REVIEWS.

Commentaries on the Procedure of Civil Courts in British India, by Hukm Chand, M.A., published by the *Bombay Education Society's Steam Press*.

The first volume of Mr. Hukm Chand's Commentaries on Civil Procedure has been completed. It deals with the first 111 Sections of the Code of Civil Procedure and extends to 834 pages. The work is on similar lines to those on "*Res judicata*" and "*Consent*" by the same

author which have already won for him a high reputation as an author. Mr. Hukm Chand made a novel departure in his former works in drawing largely upon other civilized systems of law for purposes of explanation, illustration or comparison. It was a wise and a welcome departure. No method can be more helpful for clear comprehension of the principles of law or for discrimination between what is fundamental and what is accidental or local. The wealth of learning of the author, and his prodigious industry and his minute and accurate knowledge of different systems of law have earned for him the unstinted praise of the legal profession. Mr. Hukm Chand is gifted with untiring literary activity and we have the benefit of his labors in the volume now before us. His new work will carry the author's reputation even higher and further than his former works. The amazing learning and industry displayed and the thoroughness and accuracy of treatment of the different topics must secure for the work the foremost place among works on Civil Procedure. But for its cost and bulk, it is bound to displace other commentaries upon the subject in this country. Mr. Hukm Chand is ready to face even these objections and overwhelm his critics with a host of precedents. We learn from the preface that Bolze's work on the Practice of the German Supreme Court in civil matters covers twenty volumes, that Rintelen's exposition of the law of Civil Procedure covers four volumes, that Garsonnet's work on the practice of the French Courts and Robinson's work on the Practice of the Courts of Virginia each covers seven volumes, that Wait's practice of the New York Court is in six volumes, that the Commentaries by Pisanelli on the Italian Civil Procedure Code covers seven volumes, that the work of Franceso Recci is in four volumes of 700 pages each and that Stover's work on the New York Procedure Code is in three volumes with 3,329 big pages. Mr. Hukm Chand hopes to complete his work in three volumes and if the size of the present volume is to be the standard, the whole book will contain 2,500 pages. As Mr. Hukm Chand explains, the work is not a mere index commentary, or a handy repertory of all available authorities. The object of the author is to explain the rules of the Code and the general principles upon which they are based, and to cite all cases which appear to throw real light on any rule in regard to its nature, or to the extent, or mode of its application. The author is not unaware of the dangers incidental to citations from foreign laws and decisions, but he is equipped with the knowledge required to use the foreign sources of law with discrimination. Though the work will be specially useful to the profession in India, we have no doubt it will be widely appreciated throughout the English-speaking world. The book ought to find a place on the shelf of every lawyer in this country who can afford it.